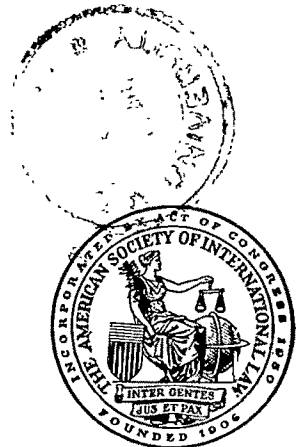


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## HUMAN RIGHTS FOR WOMEN AND WORLD PUBLIC ORDER: THE OUTLAWING OF SEX-BASED DISCRIMINATION \*

By Myres S. McDougal,\*\* Harold D. Lasswell \*\*\*  
and Lung-chu Chen \*\*\*\*

As the United Nations commemorates 1975 as "International Women's Year,"<sup>1</sup> in a concerted effort to "promote equality between men and women"<sup>2</sup> and to "ensure the full integration of women in the total development effort,"<sup>3</sup> the concern of the larger global community for outlawing sex-based discrimination is being articulated with increasing vigor. This concern both builds upon and expresses a more general norm of nondiscrimination which seeks to ban all generic differentiations among people in access to value shaping and sharing for reasons irrelevant to individual capabilities and contribution.<sup>4</sup> The particular norm against sex-based discrimination finds expression in many authoritative communications, at both international and national levels, and is rapidly being defined in a way to condemn all the great historic deprivations imposed upon women as a group.<sup>5</sup>

\* This article is excerpted from a book, *HUMAN RIGHTS AND WORLD PUBLIC ORDER*, the authors have in progress. The authors gratefully acknowledge the criticism and comments of Professors W. Michael Reisman and Barbara D. Underwood and Ms. Kreszentia M. Duer and of various members of our 1974 Seminar on Human Rights. The Ralph E. Ogden Foundation has been generous in its support of the studies from which this article is drawn.

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<sup>1</sup> GA Res. 3275 (XXIX) Dec. 10, 1974, *Resolutions of the General Assembly at Its Twenty-Ninth Regular Session* 207, UN Press Release GA/5194 (Dec. 20, 1974) [hereinafter cited as *Res. of the 29th Assembly*]; GA Res. 3010, GAOR, 27th Sess. Supp. 30, at 66, UN Doc. A/8730 (1972). See also GA Res. 3276 (XXIX) Dec. 10, 1974, *Res. of the 29th Assembly*, *supra*, at 208; GA Res. 3277 (XXIX) Dec. 10, 1974, *id.* at 209.

<sup>2</sup> GA Res. 3275, *supra* note 1, at 207; GA Res. 3010, *supra* note 1, at 67.

<sup>3</sup> *Id.*

<sup>4</sup> For detailed elaboration, see McDougal, Lasswell, & Chen, *The Protection of Respect and Human Rights: Freedom of Choice and World Public Order*, 24 AM. U. L. REV. No. 4 (forthcoming, Summer 1975).

<sup>5</sup> See authorities cited in notes 96-252 *infra* and accompanying text.

## I.

## FACTUAL BACKGROUND

The deprivation with which we are here concerned are the discriminations based upon sex, which commonly accord women less favorable treatment than men.<sup>6</sup> Practices, both governmental and private, that deny

<sup>6</sup> The literature on women's rights has mushroomed in recent years. The United Nations is an important source supplying rich materials on the changing status of women around the world, as will become evident in the documentation to follow.

On legal treatment of sex-based discriminations, with primary focus on the United States, see generally B. BABCOCK, A. FREEMAN, E. NORTON, & S. ROSS, *SEX DISCRIMINATION AND THE LAW: CAUSES AND REMEDIES* (1975); K. DAVIDSON, R. GINSBURG, & H. KAY, *TEXT, CASES AND MATERIALS ON SEX-BASED DISCRIMINATIONS* (1974); L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* (1969); L. KANOWITZ, *SEX ROLES IN LAW AND SOCIETY: CASES AND MATERIALS* (1973); S. ROSS, *THE RIGHTS OF WOMEN: THE BASIC ACLU GUIDE TO A WOMAN'S RIGHTS* (1973); Brown, Emerson, Falk, & Freedman, *The Equal Rights Amendment: A Constitutional Basis for Equal Rights for Women*, 80 YALE L.J. 872 (1971); Murray, *The Rights of Woman*, in *THE RIGHTS OF AMERICANS* 521-45 (N. Dorsen ed. 1971); Siedenberg, *The Submissive Majority: Modern Trends in the Law Concerning Women's Rights*, 55 CORNELL L. REV. 262 (1970).

For treatment from a wider comparative perspective, see *Symposium—The Status of Women*, 20 AM. J. COMP. L. 585 (1972), which deals with women in Great Britain, Sweden, Norway, France, the Soviet Union, Israel, and Senegal. A concise but useful article appears in the latest edition of *Encyclopedia Britannica*: Klein, *Status of Women*, 19 ENCYC. BRITANNICA 906 (15th ed. 1974).

On the contemporary Women's Liberation Movement, see the following classic works: S. DE BEAUVOIR, *THE SECOND SEX* (H. Parshley transl. & ed., Bantam ed. 1961); B. FRIEDAN, *THE FEMININE MYSTIQUE* (1963); K. MILLETT, *SEXUAL POLITICS* (Avon ed. 1971). See also *FEMINISM: THE ESSENTIAL HISTORICAL WRITINGS* (M. Schneir ed. 1972); *LIBERATION NOW! WRITINGS FROM THE WOMEN'S LIBERATION MOVEMENT* (Laurel ed. 1971); S. ROWBOTHAM, *WOMEN, RESISTANCE, AND REVOLUTION* (1972); *SISTERHOOD IS POWERFUL* (R. Morgan ed. 1970); *VOICES OF THE NEW FEMINISM* (M. Thompson ed. 1970); Freeman, *The New Feminism*, *THE NATION*, Mar. 9, 1974, at 297-302; *Gloria Steinem*, *NEWSWEEK*, Aug. 16, 1971, at 51-55; *The New Woman*, 1972, *TIME*, Mar. 20, 1972, at 25-34. For a most recent appraisal, see the symposium in commemoration of International Women's Year, in *SATURDAY REV.*, June 14, 1975.

For works on women from a socialist perspective, see F. ENGELS, *THE ORIGIN OF THE FAMILY, PRIVATE PROPERTY AND THE STATE* (1942); *THE WOMAN QUESTION: SELECTIONS FROM THE WRITINGS OF KARL MARX, FREDERICK ENGELS, V. I. LENIN, JOSEPH STALIN* (1951); A. BEBEL, *WOMAN UNDER SOCIALISM* (D. de Leon transl. Schocken ed. 1971).

For further general background readings on women, useful citations include: J. BARDWICK, *PSYCHOLOGY OF WOMEN: A STUDY OF BIO-CULTURAL CONFLICTS* (1971); W. CHAFE, *THE AMERICAN WOMAN: HER CHANGING SOCIAL, ECONOMIC, AND POLITICAL ROLES, 1920-1970* (1972); G. GREER, *FEMALE EUNUCH* (1970); E. JAMEWAY, *MAN'S WORLD, WOMAN'S PLACE: A STUDY IN SOCIAL MYTHOLOGY* (1971); T. LANG, *THE DIFFERENCE BETWEEN A MAN AND A WOMAN* (1971); E. LEWIS, *DEVELOPING WOMAN'S POTENTIAL* (1968); M. MEAD, *MALE AND FEMALE* (Dell ed. 1949); M. MEAD, *SEX AND TEMPERAMENT IN THREE PRIMITIVE SOCIETIES* (1935); E. MORGAN, *THE DESCENT OF WOMAN* (1972); A. MYRDAL & V. KLEIN, *WOMEN'S TWO ROLES: HOME AND WORK* (1968); *THE OTHER HALF: ROADS TO WOMEN'S EQUALITY* (C. Epstein & W. Goode eds. 1971); *THE POTENTIAL OF WOMAN* (S. Farber & R. Wilson eds. 1963); B. & T. ROSZAK, *MASCULINE/FEMININE* (1969); C. SAFILIOS-ROTHSCHILD, *TOWARD A SOCIO-*

women the protection and fulfilment of human rights on an equal footing with men are "by no means relics of the past, mere historical curiosities," but continue to be "a fact of life" in the differing communities around the world.<sup>7</sup> Sex-based discrimination derives in large part from the "arbitrary" division of male and female roles, as culturally defined, that has always existed, in the words of Margaret Mead, "in every society of which we have any knowledge."<sup>8</sup> While the concept of maleness or femaleness differs among cultures, and the specific tasks and responsibilities expected of the two sexes may vary from one society to another, the existence and perpetuation of distinct sex roles, as dictated mostly by men, have characteristically resulted in male-dominated societies in which women are regarded as "the subordinate sex,"<sup>9</sup> "the second sex,"<sup>10</sup> "the weaker sex,"<sup>11</sup> or "the Other."<sup>12</sup> In its most extreme manifestation this deprivation characterizes and treats women as a form of wealth or "property," that is, as

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OGY OF WOMEN (1972); SEX ROLES IN CHANGING SOCIETY (G. Seward & R. Williamson eds. 1970); M. TÜMIN, PATTERNS OF SOCIETY 196-214 (1973); A. WATTS, NATURE, MAN AND WOMAN (Vintage ed. 1970); WOMEN OF ALL NATIONS: A RECORD OF THEIR CHARACTERISTICS, HABITS, MANNER, CUSTOMS AND INFLUENCE (T. Joyce ed. 1912); THE WOMAN IN AMERICA (R. Lifton ed. 1965); WOMEN IN THE MODERN WORLD (R. Patai ed. 1967); WOMEN OF TROPICAL AFRICA (D. Paulme ed., H. Wright transl. 1963); WOMEN'S ROLE IN CONTEMPORARY SOCIETY: THE REPORT OF THE NEW YORK CITY COMMISSION ON HUMAN RIGHTS (1972); WOMEN, CULTURE, AND SOCIETY (M. Rosaldo & L. Lamphere eds. 1974); *Women Around the World*, 375 THE ANNALS 1 (1968).

A comprehensive, up-to-date bibliography is S. JACOBS, *WOMEN IN PERSPECTIVE: A GUIDE FOR CROSS-CULTURAL STUDIES* (1974). See also A. KRICHMAR, *THE WOMEN'S RIGHTS MOVEMENT IN THE UNITED STATES, 1848-1970: A BIBLIOGRAPHY AND SOURCEBOOK* (1972).

<sup>7</sup> L. KANOWITZ, *WOMEN AND THE LAW: THE UNFINISHED REVOLUTION* 1 (1969).

<sup>8</sup> M. MEAD, *MALE AND FEMALE*, *supra* note 6, at 39.

In the words of Ralph Linton:

All societies prescribe different attitudes and activities to men and to women. Most of them try to rationalize these prescriptions in terms of the physiological differences between the sexes or their different roles in reproduction. However, a comparative study of the statuses ascribed to women and men in different cultures seems to show that while such factors may have served as a starting point for the development of a division the actual ascriptions are almost entirely determined by culture.

R. LINTON, *THE STUDY OF MAN* 116 (1936).

<sup>9</sup> V. BULLOUGH, *THE SUBORDINATE SEX* (Penguin ed. 1974). But see E. VILAR, *THE MANIPULATED MAN* (1972).

<sup>10</sup> S. DE BEAUVOIR, *supra* note 6. But see E. DAVIS, *THE FIRST SEX* (1971).

<sup>11</sup> UNITED NATIONS, *EQUAL RIGHTS FOR WOMEN—A CALL FOR ACTION* 6 (OPI/494, 1973) [hereinafter cited as *EQUAL RIGHTS FOR WOMEN*].

<sup>12</sup> In the words of Simone de Beauvoir:

Thus humanity is male and man defines woman not in herself but as relative to him; she is not regarded as an autonomous being. . . . And she is simply what man decrees; thus she is called "the sex," by which is meant that she appears essentially to the male as a sexual being. For him she is sex—absolute sex, no less. She is defined and differentiated with reference to man and not he with reference to her; she is the incidental, the inessential as opposed to the essential. He is the Subject, he is the Absolute—she is the Other.

S. DE BEAUVOIR, *supra* note 6, at xvi.

instruments of production or enjoyment. Paradoxically, the ongoing deprivations caused by sexual differentiation have largely been accepted, consciously or unconsciously, as an inescapable fact of life by the deprivées themselves.

Despite marked improvement in status in recent decades, women around the globe still face "deep and pervasive,"<sup>13</sup> as well as on occasion, "more subtle, discrimination."<sup>14</sup> The deprivations imposed on the ground of sex, both historical and continuing, are in many ways comparable to, though occasionally more pronounced than, those of racial discrimination.<sup>15</sup> Many severe deprivations are unique to women, especially to married women.<sup>16</sup>

The deprivations women suffer commence with the "second-rung" respect they receive in practically every human society. Widely viewed as "natural appendages of men,"<sup>17</sup> "tails wagged by the male ego,"<sup>18</sup> many women are conditioned early in life to look upon themselves as "the Other," whose fulfillment lies in "assisting" and "serving" men.<sup>19</sup> Thus perceived, women are brought up to be "contented," with a belief in "their inferiority of endowment," in a special "woman's place" ascribed at birth,<sup>20</sup> and are not encouraged in extravagant demands for equality and other freedoms. In the words of a recent UN study:

Differences in sex roles begin at the moment of birth when the child is first identified as a male or female. From that moment on the child is expected to behave in accordance with the roles customarily assigned to his or her sex. By the time the girl becomes an adult she finds that her world has been slowly but effectively restricted by the

<sup>13</sup> Brown, Emerson, Falk, & Freedman, *supra* note 6, at 872.

<sup>14</sup> *Frontiero v. Richardson*, 411 U.S. 677, 686 (1973).

<sup>15</sup> 2 G. MYRDAL, *AN AMERICAN DILEMMA 1073-78* (First McGraw-Hill Paperback ed. 1964). See also S. FIRESTONE, *THE DIALECTIC OF SEX* 119-41 (1970); C. HERTON, *SEX AND RACISM IN AMERICA* (1966); A. MONTAGU, *MAN'S MOST DANGEROUS MYTH: THE FALLACY OF RACE* 186-89 (5th ed. 1974); Crozier, *Constitutionality of Discrimination Based on Sex*, 15 B.U.L. REV. 723, 727-28 (1935); Hacker, *Women as a Minority Group*, 30 SOCIAL FORCES 60 (1951), reprinted in L. KANOWITZ, *SEX ROLES IN LAW AND SOCIETY* 1-8 (1973); Murray & Eastwood, *Jane Crow and the Law: Sex Discrimination and Title VII*, 34 GEO. WASH. L. REV. 232, 233-35 (1965).

<sup>16</sup> In some respects unmarried mothers suffer additional deprivations. See UNITED NATIONS, *THE STATUS OF THE UNMARRIED MOTHER: LAW AND PRACTICE* (Report of the Secretary-General), UN Doc. E/CN.6/540/Rev.1 (1971); *Legal and Social Status of the Unmarried Mother: Report of the Secretary-General*, UN Doc. E/CN.6/562 (1971).

<sup>17</sup> H. HAYS, *THE DANGEROUS SEX* 11 (1964).

<sup>18</sup> *Id.*

<sup>19</sup> V. BULLOUGH, *supra* note 9, at 336. Betty Friedan asserts that "the core of the problem for women today is not sexual but a problem of identity—a stunting or evasion of growth that is perpetuated by the feminine mystique." B. FRIEDAN, *supra* note 6, at 69.

<sup>20</sup> As in the case of the Negro, women themselves have often been brought to believe in their inferiority of endowment. As the Negro was awarded his "place" in society, so there was a "woman's place." In both cases the rationalization was strongly believed that men, in confining them to this place, did not act against the true interest of the subordinate groups. The myth of the "contented women," who did not want to have suffrage or other civil rights and equal opportunities, has the same social function as the myth of the "contented Negro."

2 G. MYRDAL, *supra* note 15, at 1077.



rules and expectation of others. She learns that being born female sets her apart from men and limits her rights in law and in practice.<sup>21</sup>

Hence, the generic status ascribed to women is sometimes compared to that of a caste.<sup>22</sup>

In the power process, the participation of women lags far behind that of men. In some communities women are still denied the right to vote and to hold public offices.<sup>23</sup> Where the right of voting and officeholding is formally recognized, there is in fact a conspicuous underrepresentation of women at all levels of government, especially in higher decisionmaking positions.<sup>24</sup> "After half a century of women's suffrage," in the words of Klein, "the number of women in higher positions of political power and influence is still small enough for them to be known by name."<sup>25</sup> When women do hold key public offices, they tend to be confined to such "women's spheres" as social welfare, public health, and family affairs. Women may further, where the jury system prevails, be excluded from serving on juries.<sup>26</sup>

Under the inherited doctrines that "a woman has no legal existence separate from her husband" who is "head of the family"<sup>27</sup> and that "the unity

<sup>21</sup> EQUAL RIGHTS FOR WOMEN, *supra* note 11, at 6.

<sup>22</sup> C. ANDREAS, *SEX AND CASTE IN AMERICA* (1971). See also Dunbar, *Female Liberation as the Basis for Social Revolution*, in *SISTERHOOD IS POWERFUL*, *supra* note 6, at 477-92; Freeman, *The Legal Basis of the Sexual Caste System*, 5 VALPARAISO U. L. REV. 203 (1971). For a chart dramatizing "Castelike Status of Women and Negroes," see L. KANOWITZ, *supra* note 15, at 7.

<sup>23</sup> According to a recent report of the UN Secretary-General, the following six countries still deny women the rights to vote and to be elected: Jordan, Kuwait, Liechtenstein, Nigeria, Saudi Arabia, and Yemen. *Implementation of the Declaration on the Elimination of Discrimination Against Women and Related Instruments*, at 4, UN Doc. E/CN.6/571/Add. 2 (1973). See also Ungar, *Women in the Middle East and North Africa and Universal Suffrage*, 375 THE ANNALS 72 (1968).

<sup>24</sup> For a dramatic demonstration of women's underrepresentation in all levels of governments, see UN Doc. E/CN.6/571/Add. 2, *supra* note 23, at 5-16. See also M. DUVERGER, *THE POLITICAL ROLE OF WOMEN* (1955); P. LANISON, *FEW ARE CHOSEN: AMERICAN WOMEN IN POLITICAL LIFE TODAY* (1968); Menon, *From Constitutional Recognition to Public Office*, 375 THE ANNALS 34 (1968). Cf. also Abzug, Segal, & Kelber, *Women in the Democratic Party: A Review of Affirmative Action*, 6 COLUM. HUMAN RIGHTS L. REV. 3 (1974).

<sup>25</sup> Klein, *supra* note 6, at 912.

<sup>26</sup> See L. KANOWITZ, *supra* note 7, at 28-31; Johnston & Knapp, *Sex Discrimination by Law: A Study in Judicial Perspective*, 46 N.Y.U. L. REV. 675, 708-21 (1971); MURRAY, *supra* note 6, at 522; Schulder, *Does the Law Oppress Women?* in *SISTERHOOD IS POWERFUL*, *supra* note 6, at 139, 140-41.

Despite occasional doubts whether serving on juries is a "right, duty, or privilege" and whether exclusion of women from jury service constitutes "benign classification or invidious discrimination," it would appear that involuntary exclusion is a deprivation rather than an indulgence. Cf. K. DAVIDSON, R. GINSBURG, & H. KAY, *supra* note 6, at 26-35; L. KANOWITZ, *supra* note 7, at 197; L. KANOWITZ, *supra* note 15, at 74-89.

The recent decision of *Taylor v. Louisiana*, 419 U.S. 522 (1975), suggests a possible trend in a different direction. Cf. also *Case Comment, Twelve Good Persons and True: Healy v. Edwards and Taylor v. Louisiana*, 9 HARV. CIV. RIGHTS—CIV. LIB. L. REV. 561 (1974).

<sup>27</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873).

of the family" is paramount, a married woman is made to suffer a host of deprivations in the legal process. To recite Blackstone's famous dictum, marriage is a declaration of "civil death" of women.<sup>28</sup> She is commonly required to assume her husband's name.<sup>29</sup> Her acquisition, change, or loss of nationality is often made to depend on the marriage relationship and automatically to follow that of her husband, in disregard of her own wishes.<sup>30</sup> A married woman, as Bruce has summarized, may be "unable to enter into contracts, or to sue, or be sued without the consent of her husband, or judicial authorization."<sup>31</sup> "The wife," she adds, "may be subject to the husband's decision concerning domicile and residence without regard to her wishes or interests; and the husband's choice may affect her exercise of important legal rights which are determined by the domicile or residence of the husband."<sup>32</sup>

The processes of government, national and local, are often employed to sustain and institutionalize discriminations against women. The "laws, institutions, and practices" simply "relegate women to an inferior status."<sup>33</sup> In the United States, for example, "[t]here exist in the various States over 1,000 laws that discriminate against women."<sup>34</sup> In cumulative deprivation,

<sup>28</sup> Quoted in A. SINCLAIR, *THE BETTER HALF: THE EMANCIPATION OF THE AMERICAN WOMEN* 83 (1965).

<sup>29</sup> L. KANOWITZ, *supra* note 7, at 41-46; Brown, Emerson, Falk, & Freedman, *supra* note 6, at 940. Cf. also S. ROSS, *supra* note 6, at 239-55; Carlsson, *Surnames of Married Women and Legitimate Children*, 17 N.Y. L. FORUM 552 (1971); Hughes, *And Then There Were Two*, 23 HASTINGS L. J. 233 (1971); Karst, "A Discrimination So Trivial," *A Note on Law and the Symbolism of Women's Dependency*, 35 OHIO STATE L. J. 546 (1974).

<sup>30</sup> See UNITED NATIONS, CONVENTION ON THE NATIONALITY OF MARRIED WOMEN, UN Doc. E/CN.6/389 (1962); UNITED NATIONS, NATIONALITY OF MARRIED WOMEN, UN Doc. E/CN.6/254/Rev. 1 (1963); W. WALTZ, *THE NATIONALITY OF MARRIED WOMEN* (1937); McDougal, Lasswell, & Chen, *Nationality and Human Rights: The Protection of the Individual in External Arenas*, 83 YALE L. J. 900, 922-23, 939-40, 973-74 (1974).

<sup>31</sup> Bruce, *Work of the United Nations Relating to the Status of Women*, 4 HUMAN RIGHTS J. 365, 376 (1971). See also 1 W. BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 387-92 (4th ed. J. Andrews ed. 1899).

<sup>32</sup> Bruce, *supra* note 31, at 377. See also H. CLARK, *THE LAW OF DOMESTIC RELATIONS* 149-51 (1968); L. KANOWITZ, *supra* note 7, at 46-52; UNITED NATIONS, *LEGAL STATUS OF MARRIED WOMEN* (Reports submitted by the Secretary-General) 8-18, UN Doc. ST/SOA/35 (1958).

<sup>33</sup> *Hearings on Equal Rights for Men and Women 1971 Before Subcomm. No. 4 of the House Comm. on the Judiciary*, 92d Cong., 1st Sess., ser. 2, at 395-400 (1971) (remark of Professor Thomas I. Emerson) [hereinafter cited as *House Hearings on Equal Rights*]. Similarly, in the words of Kanowitz, sex-based discriminations are "supperpetuated and often aggravated by the organized might of domestic and foreign legal system." L. KANOWITZ, *supra* note 7, at 2.

<sup>34</sup> Faust, *Constitution Excluded Women*, in *House Hearing on Equal Rights*, *supra* note 33, at 106, 108. In the words of Jiagge: "The evidence of discrimination against women in private law provides enough material for several books to be written on the subject." Jiagge, *An Introduction to the Declaration on Elimination of Discrimination Against Women*, 5 UN MONTHLY CHRONICLE, 55, 58 (Mar. 1968).

a general lack among women of access to education, skill, wealth, and other values, may handicap their participation in the effective processes of a community.<sup>35</sup>

In the field of enlightenment, denial of equal educational opportunity on account of sex is still widespread.<sup>36</sup> The access of women to education, especially higher education, is either denied or restricted, in comparison to that of men. Worldwide attendance by women at institutions of higher learning falls far behind that of men.<sup>37</sup> In communities of mass illiteracy, females, especially in rural areas, typically constitute the majority of the deprived.<sup>38</sup> In some cultures women are still deliberately kept ignorant or encouraged in frivolity, which eases the perpetuation of male domination.<sup>39</sup> Despite steady progress toward coeducation, it is still a commonplace in many parts of the world that boys and girls are segregated in schools, with significantly different curricula and career orientation.<sup>40</sup> Instead of preparing girls for "full participation in the productive life of their communities and nations,"<sup>41</sup> schooling is often conceived and made "just a preamble to marriage."<sup>42</sup> Hence, in the words of a recent ILO report, "[g]irls are given education and training in line with traditional concepts of the role of women in society which are unrelated to the needs of today. They are often discouraged from studying subjects of importance."<sup>43</sup> Under the adverse influence of the inherited concepts about the respective roles of both sexes, women are deprived of opportunity to acquire, develop, and exercise a range of socially useful skills. The skills women possess

<sup>35</sup> Cf. UNITED NATIONS, 1965 SEMINAR ON THE PARTICIPATION OF WOMEN IN PUBLIC LIFE, UN Doc. ST/TAO/HR/24 (1966).

<sup>36</sup> See C. AMMOUN, STUDY OF DISCRIMINATION IN EDUCATION 29-44, UN Doc. E/CN.4/Sub.2/181/Rev.1 (1957); Beasley, *Education is the Key for Women*, 375 THE ANNALS 154 (1968); Friderich, *Access to Education at All Levels*, *id.*, at 133.

<sup>37</sup> See Klein, *supra* note 6, at 913; *House Hearings on Equal Rights*, *supra* note 33, at 37; K. DAVIDSON, R. GINSBURG, & H. KAY, *supra* note 6, at 869-86.

<sup>38</sup> *Study on Equal Access of Girls and Women to Literacy* (Report prepared by UNESCO), UN Doc. E/CN.6/538 (1970), especially at 16; Annex II, "Illiterate population and percentage of illiteracy based on censuses or surveys since 1945" in UN Doc. E/CN.6/538/Add.1 (1970) (Annex II). *Study on the Equality of Access of Girls and Women to Education in the Context of Rural Development* (Report prepared by UNESCO), UN Doc. E/CN.6/566/Rev.1 (1973), especially at 27-29, 68-69. See also UN Doc. E/CN.6/566 (1973) under the latter title.

<sup>39</sup> For a pertinent historical account, cf. generally V. BULLOUGH, *supra* note 9.

<sup>40</sup> *International Labour Organization Activities of Special Interest in relation to the Employment of Women* (Report by the International Labour Office), at 2-3 (Annex II), UN Doc. E/CN.6/556 (1971) [hereinafter cited as *ILO Report on Women*]. See also *Study of Co-Education* (Report prepared by UNESCO), UN Docs. E/CN.6/537 and Add. 1 (1969).

<sup>41</sup> *Study of the Interrelationship of the Status of Women and Family Planning* (Report of the Special Rapporteur) 13, UN Doc. E/CN.6/575 (1973) [hereinafter cited as *Report on Women and Family Planning*].

<sup>42</sup> *Id.* Cf. UNITED NATIONS, CIVIC AND POLITICAL EDUCATION OF WOMEN, UN Doc. E/CN.6/405/Rev.1 (1964).

<sup>43</sup> *ILO Report on Women*, *supra* note 40, at 3 (Annex II).

tend to concentrate in a small number of occupations, especially in what are known as female jobs.<sup>44</sup>

In regard to well-being, the physical and mental health of women is often impaired by "the burdens of involuntary childbearing."<sup>45</sup> Most of the women in the world are still denied freedom to control their own fertility because of either legal or religious prohibitions or the lack of relevant information, resources, and family planning services.<sup>46</sup> The inability to "decide freely and responsibly on the number or spacing of children (if any)"<sup>47</sup> has, in turn, deprived many women of benefits regarding "their health, education or employment and their roles in family and public life."<sup>48</sup> Sometimes women are condemned to "conditions of poverty, overwork and drudgery"<sup>49</sup> because child and home care, in addition to childbearing, are assumed and taken to be their exclusive domain.

Discrimination against women in the wealth sector is particularly pronounced. It appears that here "[s]ex bias takes a greater economic toll than racial bias."<sup>50</sup> Under the arbitrarily rigidified division of occupations into "men's work" and "women's work," women are often confined to a narrow range of "traditionally low-paying occupations or those ranked low in prestige,"<sup>51</sup> and not permitted to penetrate "a wide range of occupations at all levels."<sup>52</sup> Women are often made to "work in jobs far below their

<sup>44</sup> INTERNATIONAL LABOUR OFFICE, FIGHTING DISCRIMINATION IN EMPLOYMENT AND OCCUPATION 84-94 (1968); *Equal Pay for Work of Equal Value* (Report by the International Labour Office) 44, UN Doc. E/CN.6/550 (1971); *Report on Women and Family Planning*, *supra* note 41, at 13; *Preliminary Research Report on Working Women in the United States* (Prepared under the direction of Adele Simmons for The Twentieth Century Fund Task Force on Women and Employment, 1973), reprinted in N. DORSEN, N. CHACHKIN, & S. LAW, 1973 SUPPLEMENT TO VOLUME 2, EMERSON, HABER, & DORSEN'S POLITICAL AND CIVIL RIGHTS IN THE UNITED STATES 362-66 (1973). Cf. also *Repercussions of Scientific and Technological Progress on the Conditions of Work and Employment of Women*, UN Doc. E/CN.6/539 (1970); Shelton & Berndt, *Sex Discrimination in Vocational Education: Title IX and Other Remedies*, 62 CAL. L. REV. 1121 (1974).

<sup>45</sup> *Report on Women and Family Planning*, *supra* note 41, at 12.

<sup>46</sup> *Id.* at 10. Cf. J. VAN DER TAK, ABORTION, FERTILITY, AND CHANGING LEGISLATION: AN INTERNATIONAL REVIEW (1974).

<sup>47</sup> *Report on Women and Family Planning*, *supra* note 41, at 10.

<sup>48</sup> *Id.* at 20.

<sup>49</sup> *Id.* at 21. Cf. also Henderson, *Impact of the World Social Situation on Women*, 375 THE ANNALS 26 (1968).

<sup>50</sup> PRESIDENT'S TASK FORCE ON WOMEN'S RIGHTS AND RESPONSIBILITIES, A MATTER OF SIMPLE JUSTICE 18 (1970). See PRESIDENT'S COMMISSION ON THE STATUS OF WOMEN, REPORT OF THE COMMITTEE ON PRIVATE EMPLOYMENT (1963). See also B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, *supra* note 6, at 191-559; K. DAVIDSON, R. GINSBURG, & H. KAY, *supra* note 6, at 419-811; K. DECROW, SEXIST JUSTICE 64-155 (1974); UNITED NATIONS, SEMINAR ON THE PARTICIPATION OF WOMEN IN THE ECONOMIC LIFE OF THEIR COUNTRIES, UN Doc. ST/TAO/HR/41 (1970); Johnstone, *Women in Economic Life: Rights and Opportunities*, 375 THE ANNALS 102 (1968); Murray, *Economic and Educational Inequality Based on Sex: An Overview*, 5 VALPARAISO U. L. REV. 237 (1971).

<sup>51</sup> *Equal Pay for Work of Equal Value*, *supra* note 44, at 44.

<sup>52</sup> *Id.*

native abilities or trained capabilities.”<sup>53</sup> The virtually universal overrepresentation of women in the low paying jobs and their underrepresentation in the higher paying jobs, especially those of managerial character, result also in wide pay differentials between men and women.<sup>54</sup> Even in the same employment situation, unequal pay for work of equal value generally prevails: typically women are paid at a lower rate than men.<sup>55</sup> Job advancement is usually more difficult for women than for men.

In addition to these wealth deprivations common to women in general, a married woman suffers further deprivations. Marriage often entails significant effects upon the property relations of the spouses. Financially, a married woman is commonly made to depend upon her husband, because customarily she is assigned the role of a housekeeper. Taking care of “the home, the husband and children” is a task to be performed “without financial compensation during marriage.”<sup>56</sup> Numerous restrictions, with varying degrees of severity, are widely imposed on married women’s “right to acquire, administer, enjoy, dispose of and inherit property, including property acquired during [and before] the marriage.”<sup>57</sup> Thus, a married woman may be unable, without her husband’s authorization or consent, to make contracts binding upon either or both of them.<sup>58</sup> Without his authorization or consent, she may be legally incapable of undertaking an independent work, business, profession, or other occupation, outside the home.<sup>59</sup> She

<sup>53</sup> REPORT OF THE COMMITTEE ON PRIVATE EMPLOYMENT, *supra* note 50, at 1.

<sup>54</sup> See UNITED NATIONS, EQUAL PAY FOR EQUAL WORK (1960); *Equal Pay for Work of Equal Value* (Report by the International Labour Office), UN Doc. E/CN.6/519 (1968); *Equal Pay for Work of Equal Value* (Report by the International Labour Office), UN Doc. E/CN.6/550 (1971); Note, *The Rights of Working Women: An International Perspective*, 14 VA. J. INT’L L. 729 (1974). For studies directed to particular countries, see B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, *supra* note 6, at 440-509; Beiger, *Equal Pay, Equal Employment Opportunity and Equal Enforcement of the Law for Women*, 5 VALPARAISO U. L. REV. 203 (1971); *Equal Pay in New Zealand*, 105 INT’L LABOUR REV. 569 (1972); *Ireland: Interim Report on Equal Pay by the Commission on the Status of Women*, *id.*, at 182; Simchack, *Equal Pay in the United States*, 103 INT’L LABOUR REV. 541 (1971); Thalmann-Antenen, *Equal Pay: The Position in Switzerland*, 104 INT’L LABOUR REV. 275 (1971); Vangsnes, *Equal Pay in Norway*, 103 INT’L LABOUR REV. 379 (1971).

<sup>55</sup> See authorities cited in note 54 *supra*. Cf. also T. OEHMKE, SEX DISCRIMINATION IN EMPLOYMENT (1974).

<sup>56</sup> *Legal Capacity of Married Women: Capacity to Engage in Independent Work* (Progress Report of the Secretary-General) 4, UN Doc. E/CN.6/584 (1973).

<sup>57</sup> *Id.* at 14-15. See Kahn-Freund, *Matrimonial Property and Equality Before the Law: Some Sceptical Reflections*, 4 HUMAN RIGHTS J. 493 (1971); Pedersen, *Status of Women in Private Law*, 375 THE ANNALS 44, 47-48 (1968). Cf. also H. SIMONS, AFRICAN WOMEN: THEIR LEGAL STATUS IN SOUTH AFRICA 187-210 (1968).

<sup>58</sup> L. KANOWITZ, *supra* note 7, at 55, 197; *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873); I. W. BLACKSTONE, *supra* note 31, at 387-88. See also LEGAL STATUS OF MARRIED WOMEN, *supra* note 32, at 76-87.

<sup>59</sup> See *Legal Capacity of Married Women*, *supra* note 56. This report is concerned with “[t]he capacity of wife to undertake independent work, that is, the extent to which she may freely engage in an activity of her choice, outside the home, without having to obtain her husband’s authorization or consent, and the right of the wife to administer and dispose of her earnings or product of her work.” *Id.* at 3.

may even be required to submit her earnings to the control, management, and disposition of her husband.<sup>60</sup>

With regard to the shaping and sharing of the affection value, the "partnership" between husband and wife is generally more "unequal" than "equal."<sup>61</sup> "In some parts of the world," as Justice Annie R. Jagge, then Chairman of the Commission on the Status of Women, sharply noted, "girls under the age of ten years are given away in marriage. Young women are forced to marry men not of their choice. In some countries, consent of the woman to marriage is not a necessary legal requirement provided the consent of her parents or guardians is obtained."<sup>62</sup> Women are often denied "autonomy and equality in decisions relating to marriage itself and choice of spouse, as well as decisions during marriage and at its dissolution."<sup>63</sup> In some parts of the world, women are still victims of the practice of polygamy, especially where registration of marriages is not required.<sup>64</sup> Many communities still confer upon the father, rather than the mother, ultimate authority in matters affecting the upbringing or education of children.<sup>65</sup> The wife may even lack an equal voice in sexual and reproductive decisions.<sup>66</sup> Divorce may be effected unilaterally by the husband, but not by the wife.<sup>67</sup> The grounds and defenses available to men in proceedings for legal separation, divorce, or annulment of marriage may simply be denied to women.<sup>68</sup> Where divorce is obtainable through mutual consent, legal safeguards may be so inadequate as to render the wife's

<sup>60</sup> *Id.* at 13-17. Cf. LEGAL STATUS OF WOMEN, *supra* note 32, at 89-93.

<sup>61</sup> "The ideal of marriage generally accepted in contemporary western societies and many westernized strata of developing countries is that of partnership—that is, a sharing of interests and responsibilities between husband and wife on as nearly equal basis as possible. As was with so many other ideals, practice often falls short of precept, . . ." Klein, *supra* note 6, at 915. See also *Report on Women and Family Planning*, *supra* note 41, at 15. Regarding the shaping and sharing of affection, consult an important sociological study: W. GOODE, *WORLD REVOLUTION AND FAMILY PATTERNS* (1970).

<sup>62</sup> Jagge, *supra* note 34, at 57. See also W. GOODE, *supra* note 61, at 88-101, 104-11, 174-82, 207-18, 232-36.

<sup>63</sup> *Report on Women and Family Planning*, *supra* note 41, at 11. See also UNITED NATIONS, 1961 SEMINAR ON THE STATUS OF WOMEN IN FAMILY LIFE, UN Doc. ST/TAO/HR/11 (1961); UNITED NATIONS, 1962 SEMINAR ON THE STATUS OF WOMEN IN FAMILY LAW, UN Doc. ST/TAO/HR/14 (1962).

<sup>64</sup> *Report on Women and Family Planning*, *supra* note 41, at 15; V. BULLOUGH, *supra* note 9, at 247; W. GOODE, *supra* note 61, at 101-04, 187-88, 221-25, 282-85; Pedersen, *supra* note 57, at 46-47.

<sup>65</sup> Bruce, *supra* note 31, at 377. See generally LEGAL STATUS OF MARRIED WOMEN, *supra* note 32, at 19-43; UNITED NATIONS, PARENTAL RIGHTS AND DUTIES, INCLUDING GUARDIANSHIP (Report submitted by the Secretary-General), UN Doc. E/CN.6/474/Rev.1 (1968). ". . . the married father still plays a predominant role, especially in countries where he is considered to be the head of the family, whether explicitly or implicitly, while the married mother is relegated to a subsidiary role in this matter." UNITED NATIONS, THE STATUS OF THE UNMARRIED MOTHER (Report of the Secretary-General) 27, UN Doc. E/CN.6/540/Rev.1 (1971).

<sup>66</sup> *Report on Women and Family Planning*, *supra* note 41, at 13.

<sup>67</sup> *Id.* at 15. See W. GOODE, *supra* note 61, at 155-62, 262-68.

<sup>68</sup> Bruce, *supra* note 31, at 377; 1962 SEMINAR, *supra* note 63, at 21-26.

consent more apparent than real.<sup>69</sup> Widows, but not widowers, may be forbidden to remarry.<sup>70</sup>

In the formulation and application of the norms of rectitude (responsible conduct), the most distinguishing feature is of course the prevalence of double standards. What is permissible for men is often made impermissible for women. This is most conspicuous in the area of sexual morality. Chastity may be required of women, but not of men.<sup>71</sup> Wives may be punished for adultery, but not husbands.<sup>72</sup> Women may be penalized for prostitution, but not their male patrons.<sup>73</sup> Furthermore, women may be barred from participation in various religious rites and ceremonies, and denied access to the hierarchy of religious authority.<sup>74</sup> The cumulative impact of the various deprivations, as described above, further handicaps women's capability to participate effectively and responsibly in the social process and fosters what is called the syndrome of "social marginality," such as "withdrawal, submission, inferiority, passivity."<sup>75</sup>

## II.

### BASIC COMMUNITY POLICIES

The group differentiation of individuals upon the basis of sex, for the purpose of allocating access to value processes, is as inimical to the funda-

<sup>69</sup> *Id.* In the words of Jiagge:

Divorce laws follow the same pattern. In some countries a man can obtain a valid divorce merely by declaring three times that he has divorced his wife. Adultery is a ground of divorce available to men in some countries but not to women. Where divorce is governed by customary rules and practices, such rules are so elastic and capable of so many interpretations that it is very easy for a man to manoeuvre and obtain a divorce on practically any ground. It is significant that the same facility is not available to women.

Jiagge, *supra* note 34, at 57.

<sup>70</sup> V. BULLOUGH, *supra* note 9, at 250; W. GOODE, *supra* note 61, at 155-62, 263-64, 376-77.

<sup>71</sup> V. BULLOUGH, *supra* note 9, at 45.

<sup>72</sup> In some cultures, adultery was viewed, "not a sin against morality but a trespass against the husband's property. A husband had freedom to fornicate, while a wife could be put to death for doing the same thing." V. BULLOUGH, *supra* note 9, at 23.

<sup>73</sup> Generally speaking, "prostitution is, by definition, a crime committed only by women." Brown, Emerson, Falk, & Freedman, *supra* note 6, at 963. See B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, *supra* note 6, at 877-914; K. DAVIDSON, R. GINSBURG, & H. KAY, *supra* note 6, at 908-10. Cf. also V. BULLOUGH, *THE HISTORY OF PROSTITUTION* (1964).

<sup>74</sup> "Traditionally, women have been barred from participation in many religious ceremonies, and from full participation in the hierarchies of authority. When this could not be accomplished legally, it was often accomplished by ridicule." C. ANDREAS, *supra* note 22, at 69. See also D. BAILEY, *THE MAN-WOMAN RELATION IN CHRISTIAN THOUGHT* (1959); M. DALY, *THE CHURCH AND THE SECOND SEX* (1968); G. HARKNESS, *WOMEN IN CHURCH AND SOCIETY* (1972).

<sup>75</sup> *Report on Women and Family Planning*, *supra* note 41, at 9. In the same vein, Kanowitz has observed:

Discrimination, whether social or legal or both, not only stunts the personal development of its objects, causing them to become less socially productive; it also often nurtures the development of many traits and characteristics that on any objective scale would be deemed undesirable and unworthy.

L. KANOWITZ, *supra* note 7, at 198-99.

mental policies of shared respect as group differentiation based upon alleged ethnic characteristics.<sup>76</sup> It cannot promote freedom of choice for the individual (or provide opportunity for an individual's discovering, maturing, and exercising of latent talent, either for self-fulfilment or for contribution to aggregate common interest) to allocate benefits and burdens in social process upon putative qualities of "maleness" or "femaleness" rather than upon the actual characteristics and capabilities of individual persons. Sex, no more than race, offers no rational criterion for "classification" in "determining the legal rights of women, or of men."<sup>77</sup> Females, no less than males, require to be treated as "persons, not statistical abstractions."<sup>78</sup>

The justifications offered for sex-based discrimination, subordinating women, are traditionally in terms that it is "natural or necessary or divinely ordained."<sup>79</sup> Sometimes it is argued that discrimination is inherent "in the divine ordinance, as well as in the nature of things."<sup>80</sup> At other times it is asserted that simply out of the social necessity of functional division of activities, there exists "a wide difference in the respective spheres and destinies of man and woman."<sup>81</sup> The "domestic sphere," it is said, "properly belongs to the domain and functions of womanhood."<sup>82</sup> The boldest of discriminators may on occasion argue that women are inherently inferior to men.<sup>83</sup>

It would seem peculiarly difficult, in the light of contemporary knowledge and experience, to establish that there is something "divine" or "natural" about subjecting half of the human population to the domination of the other half. Nor has it been established that such a domination-subordination relationship is a "necessary" assignment of roles either for maximizing the fulfilment of the individual or for promoting the aggregate

<sup>76</sup> For an excellent policy exposition, see Brown, Emerson, Falk, & Freedman, *supra* note 6, at 888-900. Cf. also A. MONTAGU, *THE NATURAL SUPERIORITY OF WOMEN* 204-16 (rev. ed. 1968).

<sup>77</sup> Brown, Emerson, Falk, & Freedman, *supra* note 6, at 889. In the words of Montagu:

Human beings differ greatly in their abilities but practically not at all along sex lines; that is to say, abilities are not determined by sex. Abilities are functions of persons, *not* of groups or classes. Hence, so far as abilities are concerned both sexes should be afforded equal opportunities to realize their potentialities, and the judgment of their abilities should not be prejudiced by any bias of sex.

A. MONTAGU, *supra* note 76, at 208.

<sup>78</sup> Brown, Emerson, Falk, & Freedman, *supra* note 6, at 889.

<sup>79</sup> *Id.* at 872.

<sup>80</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130, 141 (1873).

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> See authorities cited in notes 20 and 22 *supra*. For a strong attack upon the myth of women's inferiority, see A. MONTAGU, *supra* note 76. Montagu writes:

The natural superiority of women is a biological fact, and a socially overlooked piece of knowledge. The facts have been available for half a century, but in a male-dominated world, in which the inflation of the male ego has been dependent upon the preservation of the myth of male superiority, their significance has escaped the attention merited. When the history of the subject comes to be written, this peculiar omission will no doubt serve as yet another forcible illustration that we see only what and how we want to see.

*Id.* at 205.



common interest. Indeed, all contemporary knowledge and experience would appear to confirm the opposite.

In a global community aspiring towards human dignity, a basic policy should, accordingly, be to make the social roles of the two sexes, with the notable exception of childbearing, as nearly interchangeable or equivalent as possible.<sup>84</sup> To achieve genuine equality between the sexes, it is vital that "nobody be forced into a predetermined role on account of sex, but each person be given better possibilities to develop his or her personal talents."<sup>85</sup> Such a policy need not of course preclude separate consideration of matters arising from "a physical characteristic unique to one sex."<sup>86</sup> "So long," write recent influential authors, "as the law deals only with a characteristic found in all (or some) women but in no men, or in all (or some) men but no women, it does not ignore individual characteristics found in both sexes in favor of an average based on one sex."<sup>87</sup>

In sum, the most rational general community policy requires the complete emancipation of women, without countenancing the subordination of men. John Stuart Mill affirmed a mature opinion, still relevant:

That the principle which regulates the existing social relations between the two sexes—the legal subordination of one sex to the other—is wrong in itself, and now one of the chief hindrances to human improvement; and that it ought to be replaced by a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other.<sup>88</sup>

### III.

#### TRENDS IN PRESCRIPTION

The drive toward eradication of sex-based discrimination, like that designed to eliminate racial discrimination, has in recent decades been a vital component of the trend toward a more general norm of nondiscrimination. The community concern for the protection of women, antedating the broader United Nations attack upon discrimination, was evident in certain significant areas at the turn of the twentieth century. Thus, in 1902, the Hague Conventions dealt with conflicts of national laws concerning marriage, divorce, and the guardianship of minors.<sup>89</sup> In 1904 and 1910, con-

<sup>84</sup> From a biological viewpoint, the different parts men and women play in the reproductive function undoubtedly contribute to sex differentiation in psychological development. Thus the long period of child bearing and child rearing, which falls biologically upon the female, has far-reaching implications for sex differences in interests, attitudes, emotional traits, vocational goals, and achievement.

Anastasi, *Individual Differences: Overview*, 7 INT'L ENCYC. SOC. SC. 203, 205 (1968). Cf. also Tyler, *Individual Differences: Sex Differences*, *id.* at 207.

<sup>85</sup> Ginsburg, *The Status of Women: Introduction*, 20 AM. J. COMP. L. 585, 589 (1972).

<sup>86</sup> Brown, Emerson, Falk, & Friedman, *supra* note 6, at 893.

<sup>87</sup> *Id.*

<sup>88</sup> Mill, *The Subjection of Women*, in *ESSAYS ON SEX EQUALITY: JOHN STUART MILL & HARRIET TAYLOR MILL* 123, 125 (A. Rossi ed. 1970).

<sup>89</sup> UNITED NATIONS, *THE UNITED NATIONS AND THE STATUS OF WOMEN* 3 (1964).

ventions were adopted to combat traffic in women.<sup>90</sup> The Covenant of the League of Nations represented an important development, calling for humane working conditions for all, irrespective of sex, and for the suppression of traffic in women.<sup>91</sup> Thus, employment in the League Secretariat was freed from discrimination. Article 7(3) of the Covenant of the League provided: "All positions under or in connection with the League, including the Secretariat, shall be open equally to men and women." In 1937, the League appointed an expert committee to undertake a comprehensive study on the legal status of women, the work of which was unfortunately interrupted by the outbreak of World War II. The International Labour Organization, an "autonomous partner"<sup>92</sup> of the League established in 1919, has continuously sought to achieve humane working conditions for all, irrespective of sex. In 1944, the purposes of ILO, as originally contained in the Preamble to its Constitution and Article 427 of the Treaty of Versailles,<sup>93</sup> were emphatically restated in the Declaration of Philadelphia:

[A]ll human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity, of economic security and equal opportunity.<sup>94</sup>

An impressive regional effort to protect women in Latin America has been spearheaded since 1928 by the Inter-American Commission of Women.<sup>95</sup>

The contemporary broad prescription against sex-based discrimination has its origins in the United Nations Charter and in various ancillary expressions and commitments. The more important general prohibitions of discrimination explicitly and consistently specify sex as among the impermissible grounds of differentiation. The United Nations Charter, after reaffirming in the Preamble "faith in fundamental human rights, in the dignity and worth of the human person, in the equal rights of men and women," pronounces in Article 1(3) that one of its purposes is to promote and encourage "respect for human rights and for fundamental freedoms for all without distinction" on account of sex or other grounds. This theme is

<sup>90</sup> International Agreement for the Suppression of the White Slave Traffic, signed at Paris on 18 May 1904, entered into force on 18 July 1905. For its text, see 1 LNTS 83. International Convention for the Suppression of the White Slave Traffic, signed at Paris 4 May 1910, GREAT BRITAIN, TREATY SERIES No. 20 (1912). For subsequent amendments of these two treaties in 1949 through protocols, see 30 UNTS 23, 92 UNTS 19, 98 UNTS 101. For further details, consult UNITED NATIONS, MULTILATERAL TREATIES IN RESPECT OF WHICH THE SECRETARY-GENERAL PERFORMS DEPOSITORY FUNCTIONS: LIST OF SIGNATURES, RATIFICATIONS, ACCESSIONS, ETC. AS AT 31 DECEMBER 1972, at 168-74, UN Doc. ST/LEG/SER.D/6 (1973) [hereinafter cited as MULTILATERAL TREATIES, 1972]. See also UNITED NATIONS, STUDY ON TRAFFIC IN PERSONS AND PROSTITUTION, UN Doc. ST/SOA/SD/8 (1959).

<sup>91</sup> The Covenant of the League of Nations, Art. 23(a) and (c).

<sup>92</sup> 1 L. OPPENHEIM, INTERNATIONAL LAW 717 (H. Lauterpacht ed. 8th ed. 1955).

<sup>93</sup> Treaty of Versailles, June 28, 1919, 2 MAJOR PEACE TREATIES OF MODERN HISTORY, 1648-1967, at 1265, 1522-23 (F. Israel ed. 1967).

<sup>94</sup> 2 INTERNATIONAL GOVERNMENTAL ORGANIZATIONS: CONSTITUTIONAL DOCUMENTS 1246, 1247 (A. Peaslee ed. rev. 2d ed. 1961). (Italics added).

<sup>95</sup> See authorities cited in notes 218-27 *infra* and accompanying text.

given further concrete expression in such provisions as Articles 13(1)(b), 55(c), 56, 62(2), and 76(c).<sup>96</sup> Of particular significance is Article 8 which reads:

The United Nations shall place no restrictions on the eligibility of men and women to participate in any capacity and under conditions of equality in its principal and subsidiary organs.<sup>97</sup>

The Universal Declaration of Human Rights, in setting forth "the civil and political rights and the economic, social and cultural rights to which every individual—man or woman—is entitled,"<sup>98</sup> has inspired, as in other areas, much of the contemporary activity for the protection of women. In its broad formulation of the general norm of nondiscrimination, Article 2 of the Universal Declaration specifies "sex" as among the impermissible grounds of differentiation,<sup>99</sup> a provision further reinforced by the equal

<sup>96</sup> Article 13(1)(b) reads:

The General Assembly shall initiate studies and make recommendations for the purpose of:

b. . . . promoting international co-operation in the economic, social, cultural, educational, and health fields, and assisting in the realization of human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 55(c) provides:

With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, the United Nations shall promote:

c. . . . universal respect for, and observance of, human rights and fundamental freedoms for all without distinction as to race, sex, language, or religion.

Article 56 stipulates:

All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in Article 55.

Article 62(2) states:

It [the Economic and Social Council] may make recommendations for the purpose of promoting respect for, and observance of, human rights and fundamental freedoms for all.

Article 76(c) reads:

The basic objectives of the trusteeship system, in accordance with the Purposes of the United Nations laid down in Article 1 of the present Charter, shall be:

c. . . . to encourage respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language, or religion, and to encourage recognition of the interdependence of the peoples of the world; . . .

<sup>97</sup> However, for a dramatic demonstration of women's underrepresentation in the higher positions within the United Nations, see K. DAVIDSON, R. GINSBURG, & H. KAY, *supra* note 6, at 932-34. See also Szalai, *The Situation of Women in the United Nations*, UNITAR Research Report No. 18 (1973); *Differential Treatment Based upon Sex under the Staff Regulations and Staff Rules* (Report of the Secretary-General), UN Doc. A/C.5/1519 (1973).

<sup>98</sup> Bruce, *supra* note 31, at 369-70.

<sup>99</sup> Article 2 reads in part: "Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status." UNITED NATIONS, HUMAN RIGHTS: A COMPILATION OF INTERNATIONAL INSTRUMENTS OF THE UNITED NATIONS 1, UN Doc. ST/HR/1 (1973) [hereinafter cited as UN HUMAN RIGHTS INSTRUMENTS].

protection clause of Article 7.<sup>100</sup> The two International Covenants on Human Rights, incorporating and reinforcing the general norm of nondiscrimination enunciated in the Universal Declaration, emphatically forbid discrimination on account of sex. Significantly, each of the two Covenants contains, in practically identical terms, a special article on the equality of sexes. The International Covenant on Civil and Political Rights, in Article 3, provides:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant.<sup>101</sup>

Similarly, Article 3 of the International Covenant on Economic, Social and Cultural Rights reads:

The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all economic, social and cultural rights set forth in the present Covenant.<sup>102</sup>

These separate articles are in addition to other pertinent nondiscrimination provisions which include "sex," along with race and other factors, among the prohibited grounds of differentiation.<sup>103</sup>

The general norm against sex-based discrimination, thus formulated and established, is further illustrated and reinforced by a number of conventions and other authoritative expressions oriented toward the protection of women against particular vulnerabilities or in regard to particular

<sup>100</sup> Article 7 reads:

All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

*Id.*

<sup>101</sup> *Id.* at 8.

<sup>102</sup> *Id.* at 4.

<sup>103</sup> The International Covenant on Civil and Political Rights provides in Article 2(1) that

Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status;

and adds, in Article 26, that

All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.* at 8, 11.

Similarly, the International Covenant on Economic, Social, and Cultural Rights provides in Article 2(2) that

The States Parties to the present Covenant undertake to guarantee that the rights enunciated in the present Covenant will be exercised without discrimination of any kind as to race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

*Id.* at 4.

For further elaboration, see McDougal, Lasswell, & Chen, *supra* note 4.

values.<sup>104</sup> Thus, in 1951, the Equal Remuneration Convention was adopted by the International Labour Organization to put into effect "the principle of equal remuneration for men and women workers for work of equal value."<sup>105</sup> Now operative in some 70 countries, this Convention substantially increases the protection of women in relation to wealth processes. According to Article 1, the term "equal remuneration for men and women workers for work of equal value" refers to "rates of remuneration established without discrimination based on sex,"<sup>106</sup> while "remuneration" embraces "the ordinary, basic or minimum wage or salary and any additional emoluments whatsoever payable directly or indirectly, whether in cash or in kind, by the employer to the worker and arising out of the workers' employment."<sup>107</sup> The Convention, in Article 2(1), obliges each ratifying member to "promote" and, "in so far as is consistent with" "the methods in operation for determining rates of remuneration," "ensure the application to all workers of the principle of equal remuneration for men and women workers for work of equal value."<sup>108</sup> The term "the methods in operation for determining rates of remuneration" was understood to mean not "the principles on which wage and salary structures are currently based" but "the procedures applicable in accordance with national law or practice for the purpose of fixing or settling wages and salaries in the various trades, industries or professions."<sup>109</sup> The Convention further stipulates in Article 2(2), with a flexibility appropriate for different communities, that the principle of equal remuneration may be applied by means of:

- (a) National laws or regulations;
- (b) Legally established or recognized machinery for wage determination;
- (c) Collective agreements between employers and workers; or
- (d) A combination of these various means.<sup>110</sup>

"Where such action will assist," Article 3(1) indicates, "in giving effect to the provisions" of the Convention, "measures shall be taken to promote objective appraisal of jobs on the basis of the work to be performed."<sup>111</sup> "Differential rates between workers which correspond, without regard to sex, to differences as determined by such objective appraisal in the work to be performed" are, according to Article 3(3), "not" to be considered contrary to the principle of equal remuneration.<sup>112</sup>

Of especial importance in relation to both formal and effective power is the Convention on the Political Rights of Women, adopted by the General Assembly of the United Nations in 1952, which seeks, in implementation of

<sup>104</sup> For an overview, consult *Study of Provisions in Existing Conventions that Relate to the Status of Women: Report of the Secretary-General*, UN Doc. E/CN.8/552 (1972). See also *The United Nations and the Advancement of Women* (Study prepared by Mrs. M. K. Baxter), UN Doc. A/CONF.32/L.7 (1968).

<sup>105</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 37 (preamble).

<sup>106</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 37.

<sup>107</sup> *Id.*

<sup>108</sup> *Id.*

<sup>109</sup> C. JENKS, HUMAN RIGHTS AND INTERNATIONAL LABOUR STANDARDS 92 (1960).

<sup>110</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 37.

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*

"the principle of equality of rights for men and women contained in the Charter of the United Nations," to "equalize the status of men and women in the enjoyment and exercise of political rights."<sup>113</sup> This Convention reflected the widespread recognition that "the achievement of full status for women as *citizens* was the key to acceptance of women as equal participants in the life of the community."<sup>114</sup> "This Convention," in the words of a UN study, "is not just another treaty prepared under the auspices of an international organization—it is the first instrument of international law aiming at the granting and at the protection of women's rights on a world-wide basis."<sup>115</sup> The Convention declares, in Article 1, that

Women shall be entitled to vote in all elections on equal terms with men, without any discrimination;<sup>116</sup>

and, in Article 2, that

Women shall be eligible for election to all publicly elected bodies, established by national law, on equal terms with men, without any discrimination.<sup>117</sup>

The broad reach toward voting in "all elections" and eligibility for election to "all publicly elected bodies" has obvious consequences for equality in effective power. Beyond opportunity for elective office, the Convention further affords women equal access to all appointive public posts. Article 3 reads:

Women shall be entitled to hold public office and to exercise all public functions, established by national law, on equal terms with men, without any discrimination.<sup>118</sup>

The term "public office," as the U.S. representative emphasized before the Third Committee of the General Assembly, was meant to include "posts in the civil service, the foreign or diplomatic service and the judiciary branch, as well as to posts which were primarily political in nature. The number of such posts established by national law was usually large and the tasks to be performed varied widely."<sup>119</sup> The phrase "on equal terms with men," the representative added, "covered such questions as recruitment, exemptions, salary, old-age and retirement benefits, opportunities

<sup>113</sup> *Id.* at 90 (preamble). Its text is printed in 193 UNTS 135. Operative since July 7, 1954, the Convention on the Political Rights of Women had, as of December 31, 1972, been ratified, or acceded to, by 69 states. MULTILATERAL TREATIES, 1972, *supra* note 90, at 349-50.

<sup>114</sup> UNITED NATIONS, THE CONVENTION ON THE POLITICAL RIGHTS OF WOMEN: HISTORY AND COMMENTARY I, UN Doc. ST/SOA/27 (1955). Cf. also E. FLEXNER, CENTURY OF STRUGGLE: THE WOMAN'S RIGHTS MOVEMENT IN THE UNITED STATES (1959); UNITED NATIONS, THE ROAD TO EQUALITY: POLITICAL RIGHTS OF WOMEN, UN Doc. ST/SOA/13 (1953); *Political Rights of Women* (Report of the Secretary-General), UN Doc. A/8481 (1971).

<sup>115</sup> THE CONVENTION ON THE POLITICAL RIGHTS OF WOMEN, *supra* note 114, at v.

<sup>116</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 90.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.*

<sup>119</sup> GAOR, 7th Sess., 3rd Comm. 341 (1952).

for promotion, and employment of married women, all of which were important matters in which women had sought equality for many years.”<sup>120</sup>

In 1957, the Convention on the Nationality of Married Women, adopted by the General Assembly in recognition that “conflicts in law and in practice with reference to nationality arise as a result of provisions concerning the loss or acquisition of nationality by women as a result of marriage, of its dissolution or of the change of nationality by the husband during marriage,”<sup>121</sup> sought to remedy a special inequity often imposed upon married women. This Convention is designed to “eliminate the automatic effect on the nationality of the wife of marriage, its dissolution, or the change of nationality by the husband” and to “provide a satisfactory solution to the conflicts of law regarding the effect of marriage on the nationality of the wife.”<sup>122</sup> The principal thrust of the Convention is to establish, in the crucial matter of married women’s nationality, the principle of equality between the sexes, in discard of the anachronistic doctrine of “the unity of family” as “headed by the husband.”<sup>123</sup> The Convention, going beyond such existing prescriptions as embodied in the 1930 Hague Convention on Certain Questions relating to the Conflict of Nationality Laws,<sup>124</sup> stipulates emphatically in Article 1 that

neither the celebration nor the dissolution of a marriage between one of its nationals and an alien, nor the change of nationality by the husband during marriage, shall automatically affect the nationality of the wife;<sup>125</sup>

and, in Article 2, that

neither the voluntary acquisition of the nationality of another State nor the renunciation of its nationality by one of its nationals shall prevent the retention of its nationality by the wife of such national.<sup>126</sup>

The Convention further provides in Article 3 that “specially privileged naturalization procedures” be made available for a wife who wishes to acquire the nationality of her husband.<sup>127</sup>

In striking at another deprivation of broad concern, the 1958 Discrimination (Employment and Occupation) Convention prohibits in Article 1(1)(a) “any distinction, exclusion or preference” on account of sex, along with race and other grounds, which “has the effect of nullifying or impair-

<sup>120</sup> *Id.*

<sup>121</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 56. Its text is in 309 UNTS 65. Entering into effect since August 11, 1958, the Convention, as of December 31, 1972, had been ratified, or acceded to, by 44 states. MULTILATERAL TREATIES, 1972, *supra* note 90, at 356-58.

<sup>122</sup> UNITED NATIONS, CONVENTION ON THE NATIONALITY OF MARRIED WOMEN: HISTORICAL BACKGROUND AND COMMENTARY 25, UN Doc. E/CN.6/389 (1962).

<sup>123</sup> See *id.* at 30-33; UNITED NATIONS, NATIONALITY OF MARRIED WOMEN 8-18, UN Doc. E/CN.6/254/Rev.1 (1963).

<sup>124</sup> 179 LNTS 89, 101 (Art. 8). See McDougal, Lasswell, & Chen, *supra* note 30, at 973-74.

<sup>125</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 56.

<sup>126</sup> *Id.*

<sup>127</sup> *Id.*

ing equality of opportunity or treatment in employment or occupation.”<sup>128</sup> The terms “employment” and “occupation,” Article 1(3) adds, include “access to vocational training, access to employment and to particular occupations, and terms and conditions of employment.”<sup>129</sup>

Similarly, the 1960 Convention against Discrimination in Education prohibits, pursuant to Article 1(1), “any distinction, exclusion, limitation or preference,” on account of sex, among others, which “has the purpose or effect of nullifying or impairing equality of treatment in education.”<sup>130</sup> The term “education,” Article 1(2) immediately adds, “refers to all types and levels of education, and includes access to education, the standard and quality of education, and the conditions under which it is given.”<sup>131</sup>

In 1962, the Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages was adopted by the General Assembly seeking to ensure, in substance, “equal rights” of women and men “as to marriage, during marriage and at its dissolution” by virtue of “the principle of free consent to marriage” and prohibition of child marriages.<sup>132</sup> The Convention stipulates in Article 1(1) that “[n]o marriage shall be legally entered into without the full and free consent of both parties” and “such consent” is to be “expressed by them in person after due publicity and in the presence of the authority competent to solemnize the marriage and of witnesses, as prescribed by law.”<sup>133</sup> Article 2 obliges contracting states to “take legislative action to specify a minimum age for marriage,” though it is left to each individual state to decide that particular age.<sup>134</sup> In Article 3, the Convention further requires that “all marriages” be “registered in an appropriate official register by the competent authority.”<sup>135</sup> This Convention is further strengthened and supplemented by the recommendation on the same subject adopted by the General Assembly in November, 1965.<sup>136</sup> Instead of indulging the discretion of a contracting state, the recommendation specifies that the minimum age of marriage not be lower than “fifteen years of age.”<sup>137</sup>

<sup>128</sup> *Id.* at 29.

<sup>129</sup> *Id.* Cf. also *International Labour Organization Activities of Special Interest in Relation to the Employment of Women*, UN Doc. E/CN.6/579 (1973).

<sup>130</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 31.

<sup>131</sup> *Id.* “The establishment or maintenance of separate educational systems or institutions for pupils of the two sexes” would not be barred, provided that, pursuant to Article 2(a), “these systems or institutions offer equivalent access to education, provide a teaching staff with qualifications of the same standard as well as school premises and equipment of the same quality, and afford the opportunity to take the same or equivalent courses of study.”

<sup>132</sup> Bruce, *supra* note 31, at 375. For the text of the Convention, see 521 UNTS 231; UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 92. In operation since December 9, 1964, the Convention, as of December 31, 1972, had been ratified, or acceded to, by 26 states. MULTILATERAL TREATIES, 1972, *supra* note 90, at 359–60.

<sup>133</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 92.

<sup>134</sup> *Id.*

<sup>135</sup> *Id.*

<sup>136</sup> GA Res. 2018, GAOR, 20th Sess., Supp. 14, at 36, UN Doc. A/6014 (1965). The text of the resolution is reprinted in UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 93–94.

<sup>137</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 93 (Principle II).



The basic framework in which community expectations against sex-based discrimination are crystallizing is indicated in the 1967 Declaration on the Elimination of Discrimination against Women<sup>138</sup> and in the Draft Convention on the Elimination of All Forms of Discrimination against Women, currently under consideration by the Commission on the Status of Women.<sup>139</sup> The Declaration, unanimously adopted by the General Assembly on November 7, 1967, as described by a UN statement, "marks the culmination of efforts by the United Nations and by other organs, including nongovernmental organizations, to formulate the principles of equal rights for women."<sup>140</sup> The Draft Convention is a consequence of a decision by the Commission on the Status of Women, at its twenty-fifth session in January, 1974, that "a single comprehensive draft convention should be prepared, without prejudice to the preparation of any future instrument or instruments which might be elaborated either by the United Nations or by the specialized agencies dealing with discrimination in specific fields."<sup>141</sup> The draft prepared by the Commission's Working Group is being forwarded to member governments for study and comments and the item "Consideration of a draft convention on the elimination of discrimination against women" will be accorded top priority at the Commission's twenty-sixth session in 1975, the year designated as "International Women's Year."<sup>142</sup> Whatever

<sup>138</sup> GA Res. 2263, GAOR, 22nd Sess., Supp. 16, at 35, UN Doc. A/6716 (1967). The text is *reprinted* in UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 39-40.

<sup>139</sup> COMMISSION ON THE STATUS OF WOMEN, REPORT ON THE TWENTY-FIFTH SESSION, ECOSOC, 56th Sess., Supp. 4, at 28-46, 83-84, UN Doc. E/5451(E/CN.6/589) (1974) [hereinafter cited as 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN].

<sup>140</sup> *Declaration on the Elimination of Discrimination against Women*, 4 UN MONTHLY CHRONICLE 113 (Dec. 1967). In 1963, the General Assembly, by a unanimous resolution, took the initiative in calling for the preparation of a Declaration on the elimination of discrimination against women. The Assembly instructed the Commission on the Status of Women to prepare a draft and invited member governments, the specialized agencies, and appropriate nongovernmental organizations to submit proposals for incorporation into the draft. In 1966, the General Assembly, upon receipt of the Commission's draft, decided to return it to the Commission for further work, with instructions that the suggestions made by various governments and other bodies be taken into account. The task of drafting and redrafting, though not without difficulty, came to fruition after the revised draft, completed in March 1967 by the Commission, was considered by the Assembly's Third Committee in October, and later unanimously approved by the General Assembly on November 7, 1967.

On the legislative history of the Declaration, see EQUAL RIGHTS FOR WOMEN, *supra* note 11; *Draft Declaration on the Elimination of Discrimination against Women: Note by the Secretary-General*, UN Doc. A/6678 (1967); also under the same title, UN Doc. A/6349 (1966); [1967] YEARBOOK OF THE UNITED NATIONS 513-14, 518-22 [hereinafter cited as YBUN]; [1966] YBUN 462-63, 466-68.

<sup>141</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 31. See also 11 UN MONTHLY CHRONICLE 26 (Feb. 1974). For the pros and cons of formulating a single comprehensive convention, see *Consideration of Proposals concerning a New Instrument or Instruments of International Law to Eliminate Discrimination against Women*, UN Doc. E/CN.6/573 (1973).

<sup>142</sup> Commission Res. 1 (XXV) adopted at the 618th meeting, January 25, 1974, 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 83-84. "... the proposed draft Convention was broader in scope than the Declaration but, at the same time included only fundamental aspects of women's rights and

final form this Convention may take, its substantive content is not likely to vary greatly from that of the version presently before the Commission.

Underscoring in its preamble the imperative need to "ensure the universal recognition in law and in fact of the principle of equality of men and women,"<sup>143</sup> the Declaration stresses that

discrimination against women is incompatible with human dignity and with the welfare of the family and of society, prevents their participation, on equal terms with men, in the political, social, economic and cultural life of their countries and is an obstacle to the full development of the potentialities of women in the service of their countries and of humanity;<sup>144</sup>

and that

the full and complete development of a country, the welfare of the world and the cause of peace require the maximum participation of women as well as men in all fields.<sup>145</sup>

The same theme is carried forward in the Draft Convention.<sup>146</sup>

The Declaration and the Draft Convention, drawing heavily upon the parallel formulations in relation to racial discrimination,<sup>147</sup> spell out in both broad and detailed terms the basic norm against discrimination, the commitment to effect necessary changes in both authoritative and effective power processes within national communities, and the content of prescription in relation to various critical sectors where women most require protection. The Declaration states the basic norm of nondiscrimination in Article 1:

Discrimination against women, denying or limiting as it does their equality of rights with men, is fundamentally unjust and constitutes an offence against human dignity.<sup>148</sup>

The Draft Convention in its first article adds further content to the concept of discrimination:

In this Convention the term "discrimination against women" shall mean any distinction, exclusion or restriction made on the basis of sex

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avoided detailed and specific provisions which were already embodied in the International Labour Organization and UNESCO Conventions." *Consideration of Proposals Concerning a New Instrument or Instruments of International Law to Eliminate Discrimination Against Women* (Report of the Working Group to the Commission on the Status of Women) 4, UN Doc. E/CN.6/574 (1974) [hereinafter cited as *Report of the Working Group*].

<sup>143</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 39.

<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 32-34.

<sup>147</sup> The reference is to United Nations Declaration on the Elimination of All Forms of Racial Discrimination, GA Res. 1904, GAOR, 18th Sess., Supp. 15, at 35, UN Doc. A/5515 (1963), and to International Convention on the Elimination of All Forms of Racial Discrimination, GA Res. 2106A, GAOR, 20th Sess., Supp. 14, at 47, UN Doc. A/6014 (1965). The text of these two documents is reprinted in UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 22 and 23 respectively. For a detailed analysis, with pertinent references, see McDougal, Lasswell, & Chen, *supra* note 4.

<sup>148</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 39.

which has the effect of or the purpose of nullifying the recognition, enjoyment or exercise of human rights and fundamental freedoms in the political, economic, social, cultural or any field of public life.<sup>149</sup>

This formulation, evidently adopted from Article 1(1) of the Convention on the Elimination of Racial Discrimination,<sup>150</sup> would appear to encompass at least as broad a prohibition.<sup>151</sup> As a means of expediting necessary changes in the processes of authoritative decision within national communities, the Declaration stipulates in Article 2:

All appropriate measures shall be taken to abolish existing laws, customs, regulations and practices which are discriminatory against women, and to establish adequate legal protection for equal rights of men and women, in particular:

(a) The principle of equality of rights shall be embodied in the constitution or otherwise guaranteed by law;

(b) The international instruments of the United Nations and the specialized agencies relating to the elimination of discrimination against women shall be ratified or acceded to and fully implemented as soon as practicable.<sup>152</sup>

This stipulation entails positive as well as negative formulations. Negatively, all "existing laws, customs, regulations and practices" discriminatory against women are to be abolished. Positively, "adequate legal protection for equal rights of men and women" is to be established so that in all important sectors of community life women may fully develop their potentials equally and contribute to aggregate common interest. In the course of drafting, both in the Commission and in the General Assembly, strong arguments were made in the debate against the inclusion in this provision of "customs" and "practices," along with "laws" and "regulations," on the grounds that "customs based on long-standing traditions could not be abolished overnight";<sup>153</sup> it would be more appropriate, according to this view, gradually to "modify" or "change" rather than "abolish," customs and practices.<sup>154</sup> The majority, in rejecting this view, "held it necessary to call for abolishing discriminatory customs and practices precisely because that was the very purpose of the Declaration."<sup>155</sup>

The Draft Convention, in addition to reiterating this broad stipulation, obliges in Article 2(b) and (c) a contracting state to engage in "no act

<sup>149</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 34.

<sup>150</sup> It may be recalled that Article 1(1) of the International Convention on the Elimination of All Forms of Racial Discrimination reads as follows:

In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 24.

<sup>151</sup> Cf. McDougal, Lasswell, & Chen, *supra* note 4.

<sup>152</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 39.

<sup>153</sup> EQUAL RIGHTS FOR WOMEN, *supra* note 11, at 3.

<sup>154</sup> *Id.*

<sup>155</sup> *Id.*

or practice of discrimination against women and to ensure that public authorities and public institutions, national and local, shall act in conformity with this obligation,"<sup>156</sup> and "not to sponsor, defend or support discrimination against women by any person or organizations."<sup>157</sup> The Draft Convention further proposes in Article 5(2) to prohibit by law "[a]ny advocacy of the superiority of one sex over the other and of discrimination on the basis of sex."<sup>158</sup>

In attempting to promote necessary changes in effective power processes, special attention is directed to the long-range goals of prevention and reconstruction. Particular emphasis is put upon changing stereotyped community predispositions, about the role of women and upon cultivating sounder perspectives that define appropriate roles for both women and men in the contemporary world. Thus, Article 3 of the Declaration reads:

All appropriate measures shall be taken to educate public opinion and to direct national aspirations towards the eradication of prejudice and the abolition of customary and all other practices which are based on the idea of the inferiority of women.<sup>159</sup>

The Draft Convention adds a new dimension in Article 5(1) by asserting that "the protection of motherhood is a common interest of the entire society which should bear responsibilities for it."<sup>160</sup> The bringing up of new generations is at last acknowledged as an ongoing enterprise for the whole community.

Both the Declaration and the Draft Convention spotlight certain critical areas in which women are particularly susceptible to deprivation. Amplifying some of the prior conventions which have been noted above,<sup>161</sup> they offer detailed specification of a range of protected rights, embracing all important value sectors, notably power, enlightenment, wealth, well-being, and affection.

In reference to power, the Declaration stresses the equal rights of women in regard to nationality, legal capacity, freedom of movement, and voting and officeholding (elective and appointive alike). Thus, Article 4 of the Declaration states:

All appropriate measures shall be taken to ensure to women on equal terms with men, without any discrimination:

- (a) The right to vote in all elections and be eligible for election to all publicly elected bodies;
- (b) The right to vote in all public referenda;
- (c) The right to hold public office and to exercise all public functions.

Such rights shall be guaranteed by legislation.<sup>162</sup>

<sup>156</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 34-35.

<sup>157</sup> *Id.* at 35.

<sup>158</sup> *Id.* at 36.

<sup>159</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 39.

<sup>160</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 36.

<sup>161</sup> See text and the accompanying notes 104-37 *supra*.

<sup>162</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 39.

The specification of an equal right to vote "in all public referenda," as indicated in paragraph b, is a novel feature, not included in the 1952 Convention on the Political Rights of Women.<sup>163</sup> The Draft Convention seeks in Article 8 to broaden and fortify this provision by urging that "all appropriate measures" be taken to "ensure to women on equal terms with men, without any discrimination, equal opportunities to participate in the political and public life of the country."<sup>164</sup> In illustration, the Draft Convention further underscores "equal opportunities" to "participate in the formulation of government policy and the administration thereof and to hold public office at the national and local levels"<sup>165</sup> and to "participate in nongovernmental organizations and associations."<sup>166</sup>

In the matter of nationality, the Declaration and the Draft Convention seek to protect women from the bondage and hardships caused by involuntary acquisition, change, and retention of nationality, which automatically result from marriage to an alien husband.<sup>167</sup> Article 5 of the Declaration reads:

Women shall have the same rights as men to acquire, change or retain their nationality. Marriage to an alien shall not automatically affect the nationality of the wife either by rendering her stateless or by forcing upon her the nationality of her husband.<sup>168</sup>

Drawing upon the 1957 Convention on the Nationality of Married Women,<sup>169</sup> the Draft Convention is more detailed in its formulation. Article 9(1) reads:

States Parties shall grant women the same rights as men to acquire, change or retain their nationality and shall require, in particular, that neither marriage of a woman to, nor dissolution of her marriage from, an alien nor the change of nationality by her alien husband during marriage shall automatically change her nationality, render her stateless or force upon her the nationality of her husband.<sup>170</sup>

The second paragraph of this article urges the grant of nationality to alien women married to nationals "through specially privileged naturalization procedures,"<sup>171</sup> as distinguished from those ordinarily applicable to aliens in general.

In further reference to shared power, the Declaration, in Article 6(1)(b) and (c), stipulates that "all appropriate measures, particularly legislative measures," be taken to "ensure to women, married or unmarried," the "right to equality in legal capacity and the exercise thereof"<sup>172</sup> and the

<sup>163</sup> See text and the accompanying notes 113-20 *supra*.

<sup>164</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 36.

<sup>165</sup> *Id.* [Art. 8(b)].

<sup>166</sup> *Id.* at 37 [Art. 8(d)].

<sup>167</sup> Cf. text and the accompanying notes 121-27 *supra*.

<sup>168</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 39.

<sup>169</sup> *Id.* at 56-57. See also note 167 *supra*.

<sup>170</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 37.

<sup>171</sup> *Id.*

<sup>172</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 39 [Art. 6(1)(b)].

"same rights as men with regard to the law on the movement of persons."<sup>173</sup> The Draft Convention, reinforcing this provision, specifies in Article 15 that women be accorded "equal civil and legal capacity with men in all stages of procedure in courts and tribunals"<sup>174</sup> and that "all contracts directed at restricting the legal capacity of women" be deemed "null and void."<sup>175</sup> Article 15(4) further includes "the freedom to choose residence" in the protection regarding the "movement of persons."<sup>176</sup>

In regard to the affection value, the Declaration, in Article 6(2)(b) and (c), stipulates that "[a]ll appropriate measures" be taken to "ensure the principle of equality of status of the husband and wife," especially that women be accorded "the same right as men to free choice of a spouse and to enter into marriage only with their free and full consent,"<sup>177</sup> and be accorded "equal rights with men during marriage and at its dissolution."<sup>178</sup> Emphasizing the "paramount" importance of "the interest of the children," the Declaration adds in Article 6(2)(c) that parents be accorded "equal rights and duties in matters relating to their children."<sup>179</sup> The adoption of this provision, despite considerable opposition based on the alleged threat to "the stability of the family as an institution,"<sup>180</sup> was designed to "establish the principle of sharing responsibilities between father and mother."<sup>181</sup> In addition, the Draft Convention specifically urges in Article 16(e) "[r]ecognition of equal rights to be guardians and trustees, and also of an equal right to adopt children."<sup>182</sup> In a further effort to ensure equal respect for women in reference to the affection value, the Declaration in Article 6(3) prohibits "child marriage and betrothal of young girls before puberty,"<sup>183</sup> and requires states to "specify a minimum age for marriage and to make the registration of marriages in an official registry compulsory."<sup>184</sup> Article 8 further stipulates that "[a]ll appropriate measures, including legislation," be taken to "combat all forms of traffic in women and exploitation of prostitution of women."<sup>185</sup> The same provisions are embodied respectively in Article 16(2) and Article 7 of the Draft Convention.<sup>186</sup>

In concern for equal access to enlightenment and skill, the Declaration in Article 9 offers a variety of provisions:

<sup>173</sup> *Id.* [Art. 6(1)(c)].

<sup>174</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 41 [Art. 15(2)].

<sup>175</sup> *Id.* [Art. 15(3)].

<sup>176</sup> *Id.*

<sup>177</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 39 [Art. 6(2)(a)].

<sup>178</sup> *Id.* [Art. 6(2)(b)].

<sup>179</sup> *Id.* at 40.

<sup>180</sup> EQUAL RIGHTS FOR WOMEN, *supra* note 11, at 11.

<sup>181</sup> Bruce, *supra* note 31, at 388.

<sup>182</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 42.

<sup>183</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 40.

<sup>184</sup> *Id.*

<sup>185</sup> *Id.*

<sup>186</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 42, and 36.

All appropriate measures shall be taken to ensure to girls and women, married or unmarried, equal rights with men in education at all levels, and in particular:

(a) Equal conditions of access to, and study in, educational institutions of all types, including universities and vocational, technical and professional schools;

(b) The same choice of curricula, the same examinations, teaching staff with qualifications of the same standard, and school premises and equipment of the same quality, whether the institutions are co-educational or not;

(c) Equal opportunities to benefit from scholarships and other study grants;

(d) Equal opportunities for access to programmes of continuing education, including adult literacy programmes;

(e) Access to educational information to help in ensuring the health and well-being of families.<sup>187</sup>

Paragraph e, a "very carefully drafted phrase,"<sup>188</sup> is said to be "the first—even though very indirect—reference to certain aspects of family planning in an international instrument emanating from the Commission on the Status of Women."<sup>189</sup> Essentially the same provision appears in Article 10 of the Draft Convention.<sup>190</sup>

In an effort to "ensure to women, married or unmarried, equal rights with men in the field of economic and social life," Article 10(1) of the Declaration calls for "appropriate measures" to protect certain rights:

(a) The right, without discrimination on grounds of marital status or any other grounds, to receive vocational training, to work, to free choice of profession and employment, and to professional and vocational advancement;

(b) The right to equal remuneration with men and to equality of treatment in respect of work of equal value;

(c) The right to leave with pay, retirement privileges and provision for security in respect of unemployment, sickness, old age or other incapacity to work;

(d) The right to receive family allowances on equal terms with men.<sup>191</sup>

The same article prescribes, in paragraph 2, certain special protection for women's "effective right to work" in requiring that measures be taken to "prevent" women from being dismissed "in the event of marriage or maternity" and to "provide paid maternity leave, with the guarantee of returning to former employment," and also to "provide the necessary social services, including childcare facilities."<sup>192</sup> The article further makes it clear that "measures taken to protect women in certain types of work; for reasons inherent in their physical nature," are not to be regarded as

<sup>187</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 40.

<sup>188</sup> EQUAL RIGHTS FOR WOMEN, *supra* note 11, at 16.

<sup>189</sup> *Id.*

<sup>190</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 37-38.

<sup>191</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 40.

<sup>192</sup> *Id.*

discriminatory.<sup>193</sup> A very explicit provision for protection of women in the wealth process appears elsewhere, in Article 6(1)(a), which ensures to "women, married or unmarried, equal rights with men" to "acquire, administer, enjoy, dispose of and inherit property, including property acquired during marriage."<sup>194</sup>

The Draft Convention offers more detailed protection in terms of both wealth and well-being. Thus, for example, Article 11(a) specifies women's "right to work" to include "the right of all persons to an opportunity to earn their livelihood by work which they freely choose or to which they freely consent and the right to be employed in their field of specialization in accordance with their level of qualifications"<sup>195</sup> and under Article 11(b) women are to be assured the "right to take employment and to continue their activity in the labour force and in professions irrespective of marital status or of spouse's consent."<sup>196</sup> Article 11(d) further specifies the right of women to "receive equal initial or basic vocational training for preparation for employment, and advanced training on an equal footing with men for promotion and in the event of changes in the conditions of production or technical advances and, where necessary, free retraining and restoration of levels of qualification after an enforced interruption resulting from the fulfilment by women of their maternal obligations."<sup>197</sup> Other measures adopted "for the protection of women" because of "their physical nature and for the promotion of the welfare of mothers," which in the words of Article 4(2) are not to be "interpreted as violating the principle of equality of rights of men and women,"<sup>198</sup> include the following:

(1) Protection of women workers from "heavy labour and under working conditions that are physically harmful to women" [Art. 12(a)];<sup>199</sup>

(2) Provision of "appropriate working conditions for pregnant women and nursing mother" [Art. 12(b)];<sup>200</sup>

(3) Grant of "adequate maternity leave with pay" and "without loss of the job held" [Art. 12(c)];<sup>201</sup>

(4) Prohibition on dismissing women on maternity leave or on account of their being "pregnant" or "nursing a child" [Art. 12(d)];<sup>202</sup>

(5) Adequate pay leave to accommodate childcare needs [Art. 12(e) and (f)];<sup>203</sup>

(6) Provision to women of "free medical care during pregnancy, confinement and the post-natal period" [Art. 12(g)];<sup>204</sup>

(7) Provision of adequate childcare facilities and services [Art. (13)].<sup>205</sup>

The Draft Convention makes it clear, further, that the proposed measures of protection for women in the fields of wealth and well-being are intended

<sup>193</sup> *Id.* [Art. 10(3)].

<sup>194</sup> *Id.* at 39.

<sup>195</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 38.

<sup>196</sup> *Id.*

<sup>197</sup> *Id.*

<sup>198</sup> *Id.* at 35.

<sup>199</sup> *Id.* at 39.

<sup>200</sup> *Id.*

<sup>201</sup> *Id.* at 40.

<sup>202</sup> *Id.*

<sup>203</sup> *Id.*

<sup>204</sup> *Id.*

<sup>205</sup> *Id.* at 40-41.



for wide application. Thus, Article 14 reads:

The provisions of articles 11, 12, 13 and 14 shall apply to all women without exception, who are gainfully employed in State co-operative, public and private institutions, industrial and non-industrial enterprises and other organizations in agriculture and on plantations, and also to women who perform for any organizations or individuals remunerated work at home or who are gainfully employed in domestic work.<sup>206</sup>

Finally, to eliminate double standards in relation to responsible conduct, the Declaration stipulates in Article 7 that "[a]ll provisions of penal codes which constitute discrimination against women shall be repealed."<sup>207</sup> This is primarily designed to protect women against prosecution for certain crimes hitherto uniquely ascribed to women or crimes in which double standards are employed in defining the crimes.<sup>208</sup>

The profound concern for eradicating discrimination on account of sex contained in the Declaration and the Draft Convention is fortified by many parallel expressions emanating from various United Nations and related bodies.<sup>209</sup> The Proclamation of Teheran, adopted by the International Conference on Human Rights in May 1968, appropriately summarizes:

The discrimination of which women are still victims in various regions of the world must be eliminated. An inferior status for women is contrary to the Charter of the United Nations as well as the provisions of the Universal Declaration of Human Rights. The full implementation of the Declaration of the Elimination of Discrimination against Women is a necessity for the progress of mankind.<sup>210</sup>

The call of the Conference for "measures to promote women's rights in the modern world, including a unified long-term United Nations programme for the advancement of women"<sup>211</sup> was soon followed up by the General Assembly in adopting such a program in 1970.<sup>212</sup> In its resolution on "International Development Strategy for the Second United Nations Development Decade," adopted in October 1970, the General Assembly included among the "goals and objectives" of the Decade the encouragement of "the full integration of women in the total development effort."<sup>213</sup> In order to further "strengthen universal recognition of the principle of the equality

<sup>206</sup> *Id.* at 41.

<sup>207</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 40.

<sup>208</sup> Other examples include application of double standards to "such matters as adultery and even murder in certain instances, where the husband was permitted to plead reasons of personal honour to justify killing of his wife in certain circumstances." EQUAL RIGHTS FOR WOMEN, *supra* note 11 at 15. See also B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, *supra* note 6, at 819-914; Bruce, *supra* note 31, at 389.

<sup>209</sup> Cf. UNITED NATIONS, THE UNITED NATIONS AND THE STATUS OF WOMEN (1964); Bruce, *supra* note 31.

<sup>210</sup> UN HUMAN RIGHTS INSTRUMENTS, *supra* note 99, at 19; UNITED NATIONS, FINAL ACT OF THE INTERNATIONAL CONFERENCE ON HUMAN RIGHTS, TEHERAN, 22 APRIL TO 13 MAY 1968, at 4, UN Doc. A/CONF.32/41 (1968) [hereinafter cited as FINAL ACT OF THE HUMAN RIGHTS CONFERENCE].

<sup>211</sup> FINAL ACT OF THE HUMAN RIGHTS CONFERENCE, *supra* note 210, at 10-11.

<sup>212</sup> GA Res. 2716, GAOR, 25th Sess., Supp. 28, at 81-83, UN Doc. A/8023 (1970).

<sup>213</sup> GA Res. 2626, *id.*, at 39, 41.

of men and women, *de jure* and *de facto*,"<sup>214</sup> the General Assembly, in its resolution 3010 of December 18, 1972, proclaimed "the year 1975 International Women's Year."<sup>215</sup> It urges "intensified action" to "promote equality between men and women" and to "ensure the full integration of women in the total development effort."<sup>216</sup>

On the regional level, sex is included among the impermissible grounds of differentiation in both the European Convention on Human Rights and the American Convention on Human Rights. The European Convention states in Article 14 that "the enjoyment of the rights and freedoms" provided in the Convention are to be "secured without discrimination" because of sex or other grounds.<sup>217</sup> The American Convention, in Article 1(1), obliges the contracting states to "undertake to respect the rights and freedoms" provided in the Convention and to "ensure to all persons subject to their jurisdiction the free and full exercise of those rights and freedoms, without any discrimination" on account of "sex" or other factors.<sup>218</sup> It may be noted that even before the adoption of the American Convention of Human Rights in November, 1969, significant achievements for the protection of women had been made under the Inter-American System, which considerably inspired the work of the UN bodies in the protection of women's rights.<sup>219</sup> Beginning with the concern for protecting women's rights, as expressed in the Fifth International Conference of American States in 1923,<sup>220</sup> through the establishment and functioning of the Inter-American Commission of Women,<sup>221</sup> a number of regional prescriptions for the protection of women had come into being. Notably, the Montevideo Convention on the Nationality of Women of 1933 pioneered the principle of equality of sexes regarding nationality: "There shall be no distinction based on sex as regards nationality in their legislation or in their practice" (Art. 1).<sup>222</sup> The Lima Declaration in Favor of Women's Rights, adopted

<sup>214</sup> GA Res. 3010, GAOR, 27th Sess., Supp. 30, at 66, UN Doc. A/8730 (1972).

<sup>215</sup> *Id.* at 67.

<sup>216</sup> *Id.* See also notes 2 and 3 *supra*.

<sup>217</sup> BASIC DOCUMENTS ON INTERNATIONAL PROTECTION OF HUMAN RIGHTS 125, 130 (L. Sohn & T. Buergenthal eds. 1973) [hereinafter cited as BASIC DOCUMENTS]. The Rome Treaty of 1958, establishing the European Economic Community, states, in Article 119, that "each member State shall apply the principle of equal pay for men and women in the case of the same work."

<sup>218</sup> BASIC DOCUMENTS, *supra* note 217, at 210.

<sup>219</sup> See ORGANIZATION OF AMERICAN STATES, GENERAL SECRETARIAT, THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS, 1960-1967, at 69-79 (1972) [hereinafter cited as OAS AND HUMAN RIGHTS]. *Report Submitted by the Organization of American States* 68-80, UN Doc. A/CONF.32/L.10 (1968) [hereinafter cited as OAS Report].

<sup>220</sup> See OAS AND HUMAN RIGHTS, *supra* note 219, at 69; OAS Report, *supra* note 219, at 68-69.

<sup>221</sup> OAS AND HUMAN RIGHTS, *supra* note 219, at 69-70; OAS Report, *supra* note 219, at 69-70. For accounts of the recent activities of the Inter-American Commission of Women, see *Report of the Inter-American Commission of Women*, UN Doc. E/CN.6/558 (1972); *Programme of Concerted International Action to Promote the Advancement of Women and Their Integration in Development* (Report of the Inter-American Commission of Women), UN Doc. E/CN.6/572 (1973).

<sup>222</sup> NATIONALITY OF MARRIED WOMEN, *supra* note 123, at 23-24.

at the Eighth International Conference of American States in 1938,<sup>223</sup> emphatically pronounced that "women have the right" to "political treatment on the basis of equality with men," to "the enjoyment of equality as to civil status," to "full protection in and opportunity for work," and to "the most ample protection as mothers."<sup>224</sup> In 1948, at the Ninth Conference of the Organization of American States held in Bogota, Colombia, the long years of efforts on the part of the Inter-American Commission of Women culminated in the adoption of two separate conventions: the Inter-American Convention on the Granting of Political Rights to Women, stipulating that "the right to vote and to be elected to national office shall not be denied or abridged by reason of sex";<sup>225</sup> and the Inter-American Convention on the Granting of Civil Rights to Women, pursuant to which the contracting states pledge to "grant to women the same civil rights that men enjoy."<sup>226</sup> Meanwhile, the American Declaration of the Rights and Duties of Man, adopted at the same Conference and antedating the Universal Declaration of Human Rights, also pronounced in Article 2 that

All persons are equal before the law and have the rights and duties established in this Declaration, without distinction as to race, sex, language, creed or any other factor.<sup>227</sup>

The accelerating movement toward the reform of national constitutions to secure equal rights for women adds substance to transnational expectations in behalf of nondiscrimination. The United States offers an excellent example. A long line of judicial decisions, slowly enlarging the rights of women,<sup>228</sup> and changing community expectations have culminated in a proposed Equal Rights Amendment to the Constitution which is in the process of being ratified. The substantive sections of the proposed Equal Rights Amendment, as passed by the U.S. Congress on March 22, 1972, read as follows:

Section 1. Equality of rights under the law shall not be denied or abridged by the United States or by any State on account of sex.

Section 2. The Congress shall have the power to enforce, by appropriate legislation, the provisions of this article.<sup>229</sup>

<sup>223</sup> CARNEGIE ENDOWMENT FOR INTERNATIONAL PEACE, THE INTERNATIONAL CONFERENCES OF AMERICAN STATES, FIRST SUPPLEMENT, 1933-1940, at 250 (1940).

<sup>224</sup> *Id.*

<sup>225</sup> CONVENTION ON THE POLITICAL RIGHTS OF WOMEN, *supra* note 114, at 4.

<sup>226</sup> *Id.* (n. 6).

<sup>227</sup> BASIC DOCUMENTS, *supra* note 217, at 187, 188.

<sup>228</sup> See N. DORSEN, N. CHACHKIN, & S. LAW, *supra* note 44, at 347-90. Cf. also B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, *supra* note 6; K. DAVIDSON, R. GINSBURG, & H. KAY, *supra* note 6; L. KANOWITZ, *supra* note 15.

<sup>229</sup> As of August 24, 1974, 33 states out of the required 38 had ratified the Amendment. N.Y. Time, Aug. 24, 1974, at 12, col. 1 (city ed.). The tortuous legislative history of this amendment is indicated in Brown, Emerson, Falk, & Freedman, *supra* note 6, at 981-85. See also *Hearings on S.J. Res. 61 Before the Subcomm. on Constitutional Amendments of the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970); *Hearings on S.J. Res. 61 and S.J. Res. 231 Before the Senate Comm. on the Judiciary*, 91st Cong., 2d Sess. (1970); *House Hearings on Equal Rights*, *supra* note

From the decision in *Bradwell v. Illinois* (1873),<sup>230</sup> sanctioning the exclusion of women from the legal profession, as grounded in the anachronistic doctrine of "women's separate place" in society, the United States Supreme Court had moved a long way when, in 1971, it held unconstitutional, in *Reed v. Reed*,<sup>231</sup> an Idaho statute purporting to favor males over females in the matter of administering estates. In the words of the Court:

To give a mandatory preference to members of either sex over members of the other, merely to accomplish the elimination of hearings on the merits, is to make the very kind of arbitrary legislative choice forbidden by the Equal Protection Clause of the Fourteenth Amendment; and whatever may be said as to the positive values of avoiding intrafamily controversy, the choice in this context may not lawfully be mandated solely on the basis of sex.<sup>232</sup>

The emerging prescription is further fortified by *Frontiero v. Richardson* (1973),<sup>233</sup> in which the Supreme Court declared unconstitutional statutes which allow a serviceman to claim his wife, "for the purposes of obtaining increased quarters allowances and medical and dental benefits," "as a 'dependent' without regard to whether she is in fact dependent upon him for any part of her support,"<sup>234</sup> but disallows a servicewoman to "claim her husband as a 'dependent'" "unless he is in fact dependent upon her for over one-half of his support."<sup>235</sup> Mr. Justice Brennan, announcing the judgment of the Court and speaking for himself and three other Justices, observed that

since sex, like race and national origin, is an immutable characteristic determined solely by the accident of birth, the imposition of special disabilities upon the members of a particular sex because of their sex would seem to violate "the basic concept of our system that legal burdens should bear some relationship to individual responsibility."<sup>236</sup>

"And what differentiates sex," Justice Brennan elaborates, "from such non-suspect statuses as intelligence or physical disability, and aligns it with the recognized suspect criteria, is that the sex characteristic frequently bears no relation to ability to perform or contribute to society. As a result, statutory distinctions between the sexes often have the effect of invidiously relegating the entire class of females to inferior legal status without regard to the actual capabilities of its individual members."<sup>237</sup> "[C]lassifications based upon sex," he adds, "like classifications based upon race, alienage, or national origin, are inherently suspect, and must therefore be subjected to strict judicial scrutiny."<sup>238</sup> "Applying the analysis mandated by that

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349; WOMEN AND THE "EQUAL RIGHTS" AMENDMENT: SENATE SUBCOMMITTEE HEARINGS ON THE CONSTITUTIONAL AMENDMENT, 91ST CONGRESS (C. Stimpson ed. 1972); B. BABCOCK, A. FREEDMAN, E. NORTON, & S. ROSS, *supra* note 6, at 129-89.

<sup>230</sup> *Bradwell v. Illinois*, 83 U.S. (16 Wall.) 130 (1873).

<sup>231</sup> *Reed v. Reed*, 404 U.S. 71 (1971).

<sup>232</sup> *Id.* at 76-77.

<sup>233</sup> *Frontiero v. Richardson*, 411 U.S. 677 (1973).

<sup>234</sup> *Id.* at 678.

<sup>235</sup> *Id.* at 678-79.

<sup>236</sup> *Id.* at 686.

<sup>237</sup> *Id.* at 686-87.

<sup>238</sup> *Id.* at 688.

stricter standard of review,"<sup>238</sup> Justice Brennan concluded that,

by according differential treatment to male and female members of the uniformed services for the sole purpose of achieving administrative convenience, the challenged statutes violate the Due Process Clause of the Fifth Amendment insofar as they require a female member to prove the dependency of her husband.<sup>240</sup>

The *Reed* and *Frontiero* decisions undoubtedly harbinger a great potential for both the Fifth and the Fourteenth Amendments in coping with sex-based discriminations. Nevertheless, insistent demands continue that the Equal Rights Amendment be ratified without delay. As Emerson and his co-authors eloquently put it,

We believe that the necessary changes in our legal structure can be accomplished effectively only by a constitutional amendment. The process of piecemeal change is long and uncertain; the prospect of judicial change through interpretation of the Fourteenth Amendment is remote and the results are likely to be inadequate. The Equal Rights Amendment provides a sound constitutional basis for carrying out the alterations which must be put into effect. It embodies a consistent theory that guarantees equal legal rights for both sexes while taking into account unique physical differences between the sexes. In the tradition of other great constitutional mandates, such as equal protection for all races, the right to freedom of expression, and the guarantee of due process, it supplies the fundamental legal framework upon which to build a coherent body of law and practice designed to achieve the specific goal of equal rights.<sup>241</sup>

A comprehensive comparative study, while it presumably would reveal considerable diversity in the detailed practice of different communities, would certainly confirm a trend toward prescription of equality between the sexes.<sup>242</sup> As noted elsewhere, it is practically a universal pattern in national constitutions to prescribe a general form of equality, which typically condemns sex, along with race and other factors, as a basis of differential treatment.<sup>243</sup> Many constitutions have gone further by enunciating separate provisions for equality of the sexes, explicitly highlighting equal rights for women as well as men. Thus, the 1949 Constitution of the German Federal Republic declares, in Article 3(2), that "[m]en and women shall have equal rights."<sup>244</sup> The 1936 Constitution of the USSR

<sup>238</sup> *Id.*

<sup>240</sup> *Id.* at 690-91.

<sup>241</sup> Brown, Emerson, Falk, & Freedman, *supra* note 6, at 979. With or without appropriate constitutional amendment, lawyers engaged in litigation for the protection of human rights might make much more effective use of the transnational prescriptions outlined above. Irrespective of whether particular conventions have been ratified by the United States, the general norm of nondiscrimination could be found to be a part of the customary international law which is the law of the land of the United States.

<sup>242</sup> See e.g., UNITED NATIONS, CONSTITUTIONS, ELECTORAL LAWS AND OTHER LEGAL INSTRUMENTS RELATING TO THE POLITICAL RIGHTS OF WOMEN, UN Doc. A/6447/Rev.1 (1968); Symposium—*The Status of Women*, 20 AM. J. COMP. L. 585 (1972).

<sup>243</sup> See McDougal, Lasswell, & Chen, *supra* note 4.

<sup>244</sup> BASIC DOCUMENTS ON HUMAN RIGHTS 19 (I. Brownlie ed. 1971).

states in Article 122:

Women in the U.S.S.R. are accorded equal rights with men in all spheres of economic, government, cultural, political and other public activity.

The possibility of exercising these rights is ensured by women being accorded an equal right with men to work, payment for work, rest and leisure, social insurance and education, and by state protection of the interests of mother and child, state aid to mothers of large families and unmarried mothers, maternity leave with full pay, and the provision of a wide network of maternity homes, nurseries and kindergartens.<sup>245</sup>

Similarly, Article 96 of the Constitution of the People's Republic of China, 1954, reads:

In the People's Republic of China women enjoy equal rights with men in all spheres—political, economic, cultural, social and domestic.

The state protects marriage, the family, and the mother and child.<sup>246</sup>

Article 51 of the Constitution of Paraguay, 1967, provides:

This Constitution upholds the equality of the civil and political rights of men and women, whose correlative duties shall be established in the law, attending the purposes of matrimony and to the unity of the family.<sup>247</sup>

Quite recently, the new Constitution of Egypt, adopted in 1972, stipulates in Article 11 that "[t]he State shall reconcile women's duties to their families and women's work in society and shall ensure the equality of women with men in the political, social, cultural and economic fields, without violating the law of the Islamic Sharia."<sup>248</sup>

Oftentimes protection of equal rights for women is sought through statutes. For instance, Israel's Woman's Equal Rights Law, 5711-1951, stipulates that "[w]ith regard to any legal act, the same law shall apply to a woman and a man, and any provision of law that discriminates against

<sup>245</sup> *Id.* at 26. See Tay, *The Status of Women in the Soviet Union*, 20 AM. J. COMP. L. 662 (1972).

<sup>246</sup> BASIC DOCUMENTS ON HUMAN RIGHTS, *supra* note 244, at 48.

<sup>247</sup> 4 CONSTITUTIONS OF NATIONS 1067, 1074 (A. Peaslee ed. rev. 3d ed. 1970).

<sup>248</sup> *Implementation of the Declaration on the Elimination of Discrimination Against Women and Related Instruments* (Report of the Secretary-General) 11, UN Doc. E/CN.6/571 (1973).

Of course what is meant by "the law of the Islamic Sharia" is critical here. In aid of interpretation, consult generally 1 A. ALI, MAHOMMEDAN LAW (4th ed. 1912); 2 A. ALI, MAHOMMEDAN LAW (5th ed. 1929); A. ALI, THE SPIRIT OF ISLAM (1922), especially at 222-57; J. ANDERSON, ISLAMIC LAW IN AFRICA (1954); J. ANDERSON, ISLAMIC LAW IN THE MODERN WORLD (1959); A. MEER, THE LEGAL POSITION OF WOMEN IN ISLAM (1912); R. ROBERTS, THE SOCIAL LAWS OF THE QUORAN (1925); J. SCHACHT, INTRODUCTION TO ISLAMIC LAW (1964). Cf. also H. GIBB, MODERN TRENDS IN ISLAM (1947; 1972); H. GIBB, MOHAMMEDANISM: AN HISTORICAL SURVEY (2d ed. Galaxy Book ed. 1962); H. GIBB, STUDIES ON THE CIVILIZATION OF ISLAM (1962; 1968); M. QUTB, ISLAM, THE MISUNDERSTOOD RELIGION (1969); W. SMITH, ISLAM IN MODERN HISTORY (1957); THEMES OF ISLAMIC CIVILIZATION (J. Williams ed. 1971).

women as women shall be of no effect.”<sup>249</sup> The General Federation of Iraqi Women Act (No. 13 of 1972) spotlighted “the need to raise the level of women by all possible means and to ensure their enjoyment of equal rights with men in all political, social, civic, economic and cultural fields, to provide them with employment opportunities, to defend their rights and interests and to abolish existing laws, customs, regulations and practices which are discriminatory against women.”<sup>250</sup> Other examples are documented in the Reports of the UN Secretary-General on “Implementation of the Declaration on the Elimination of Discrimination against Women and Related Instruments.”<sup>251</sup> A report of the Secretary-General points out, in sum, that “on the whole, a trend exists in those countries where full compliance in law with the provisions of the Declaration has not yet been achieved, towards the realization of a greater measure of compliance, if not total compliance in law, with the rights set forth in this international instrument.”<sup>252</sup>

#### IV.

##### PROPOSALS FOR APPLICATION

The contemporary provision for implementation and application of the vast body of transnational prescriptions designed to secure equality of women with men is even more primitive than that designed to minimize racial discrimination.<sup>253</sup> In 1968, one year after the adoption of the Declaration on the Elimination of Discrimination against Women, the Economic and Social Council, acting on the recommendation of the Commission on the Status of Women, adopted a resolution, urging such “measures of implementation” as “publicity,” “studies,” revision of “national legislation,” and, more importantly, a reporting system.<sup>254</sup> Needless to say, measures wholly dependent upon state cooperation, such as these, are scarcely adequate to the critical tasks of “implementation.” It has increasingly been stressed that—given the decentralized character of the world arena and the complex root causes of sex-based discriminations—more comprehensive, more concerted, and more centrally directed measures are required.

The United Nations has, consequently, launched a unified long-term program for the advancement of women.<sup>255</sup> This comprehensive program is designed, by promoting peoples’ understanding, to generate changes in effective power which will make official application, national and trans-

<sup>249</sup> Quoted in Albeck, *The Status of Women in Israel*, 20 AM. J. COMP. L. 693 (1972).

<sup>250</sup> *Implementation of the Declaration*, *supra* note 248, at 12.

<sup>251</sup> See e.g., UN Doc. E/CN.6/548 (1971); UN Doc. E/CN.6/571, *supra* note 248.

<sup>252</sup> UN Doc. E/CN.6/548, *supra* note 251, at 15.

<sup>253</sup> Cf. McDougal, Lasswell, & Chen, *supra* note 4.

<sup>254</sup> ECOSOC Res. 1325, ECOSOC, 44th Sess., Supp. I, at 13, UN Doc. E/4548 (1968).

<sup>255</sup> GA Res. 2716, GAOR, 25th Sess., Supp. 28, at 81-83, UN Doc. A/3028 (1970).

national, easier.<sup>256</sup> The program is arranged to celebrate International Women's Year. Following the General Assembly proclamation of the year 1975 as International Women's Year,<sup>257</sup> the Commission on the Status of Women devoted itself to working out a comprehensive program of activities,<sup>258</sup> which was approved by the Economic and Social Council in May 1974.<sup>259</sup> Seeking to "promote equality between men and women," "ensure the full integration of women in the total development effort," and "increase the contribution of women to the development of friendly relations and co-operation among States and to the strengthening of world peace."<sup>260</sup> the International Women's Year projects this central theme—"EQUALITY, DEVELOPMENT AND PEACE."<sup>261</sup> This program, comprehensive and detailed, is addressed, in the hope of active participation, to "Member States, the United Nations, the specialized agencies, regional intergovernmental organizations, the national and international organizations and non-governmental organizations in consultative status concerned."<sup>262</sup> In addition to the projected "activities at the regional and international levels,"<sup>263</sup> the program urges states to undertake a variety of measures, including "special acts of commemoration,"<sup>264</sup> mapping out national priorities and programs,<sup>265</sup> creation of special bodies,<sup>266</sup> "publicity and educational measures,"<sup>267</sup> "studies and surveys,"<sup>268</sup> holding conferences,<sup>269</sup> "exchange programs,"<sup>270</sup> and "ratification and implementation of international instruments."<sup>271</sup> With all these changes in perspectives and new activities, the prospects for a more effective application of the now widely accepted norm of nondiscrimination would appear to be substantially enhanced.

It is highly probable that in future years these recent initiatives will be sustained and extended by currents that pervade the global community.

<sup>256</sup> See UNITED NATIONS, UNITED NATIONS ASSISTANCE FOR THE ADVANCEMENT OF WOMEN, UN Doc. E/CN.6/467 (1967); UNITED NATIONS, THE UNITED NATIONS AND HUMAN RIGHTS 66-72 (1973); Bruce, *supra* note 31, at 391-412; *Implementation of a Programme of Concerted International Action* (Report of the Secretary-General), UN Doc. E/CN.6/577 (1973); *Further Elaboration of a Programme of Concerted Action* (Report of the Secretary-General), UN Doc. E/CN.6/553 (1972). Cf. also UNITED NATIONS, PARTICIPATION OF WOMEN IN COMMUNITY DEVELOPMENT, UN Doc. E/CN.6/514/Rev. 1 (1972); UNITED NATIONS, REPORT OF THE INTERREGIONAL MEETING OF EXPERTS ON THE INTEGRATION OF WOMEN IN DEVELOPMENT, UN Doc. ST/SOA/120 (1972).

<sup>257</sup> GA Res. 3010, *supra* note 214.

<sup>258</sup> 1974 REPORT OF THE COMMISSION ON THE STATUS OF WOMEN, *supra* note 139, at 1-3, 20-27, 103-13. Regarding the Commission's deliberations at its twenty-fifth session, see UN Docs. E/CN.6/SR.599-612 (1974).

<sup>259</sup> ECOSOC Res. 1849 (LVI), May 16, 1974, UN Doc. E/RES/1849 (1974). See also *International Women's Year: Report of the Secretary-General*, UN Doc. E/CN.6/576 (1973); *International Women's Year: Report of the Working Group to the Commission on the Status of Women*, UN Doc. E/CN.6/588 (1974); note 1 *supra*.

<sup>260</sup> ECOSOC Res. 1849 (LVI), *supra* note 259, at 3.

<sup>261</sup> *Id.*

<sup>262</sup> *Id.* at 1.

<sup>263</sup> *Id.* at 11-13.

<sup>264</sup> *Id.* at 7.

<sup>265</sup> *Id.* at 7-8.

<sup>266</sup> *Id.* at 8.

<sup>267</sup> *Id.* at 8-10.

<sup>268</sup> *Id.* at 10.

<sup>269</sup> *Id.* at 11.

<sup>270</sup> *Id.*

<sup>271</sup> *Id.*



The degree to which effective application of the new prescriptions forbidding sex-based discrimination can be secured will of course depend in measure upon how human rights in general, and especially all the other rights to equality projected in the more general norm of nondiscrimination, are protected and fulfilled. Since many of the deprivations imposed upon women are attributable to long-held traditions about the unique role ascribed to them in childbearing and child rearing, it is possible that the explosive growth of the biological sciences will exert a profound influence on the role-separation of the sexes. It may, for example, no longer be necessary for the embryo to spend its formative months enclosed in the female body. As the biological constraints of an earlier day are transmuted into biological and cultural choices and the function of the family in social process changes, the alternatives open to world public order will be less and less constrained by yesterday's rationalizations of sexual difference as a means of justifying the subordination of women. Similarly, even some of the least welcome tendencies in the world arena, such as the persisting expectations of violence, may contribute to the elimination of discriminations that have been traditionally justified in terms of sex. In a world of universalizing science-based technology, an outstanding consequence of war and preparation for war must be the socialization of risk. No massive barrier can be made to separate danger "at the front" from the threats to which the civilian population is exposed. It may, thus, be increasingly recognized as foolhardy for a public order to maintain discriminations directed against half its population, compromising the security of the whole by failing to enlist and employ the latent capabilities of the deprived half. It is, finally, most unlikely that the insistent demands of the hitherto deprived half for equality in every nook and cranny of life will lessen in intensity.



## THE UNITED STATES—HUNGARIAN CLAIMS AGREEMENT OF 1973

By Richard B. Lillich \*

Over a quarter century after most of them arose, an agreement settling claims of the United States against Hungary was signed at Washington on March 6, 1973.<sup>1</sup> Under its terms Hungary will pay a lump sum of \$18,900,000 in settlement of the claims of the United States and its nationals arising out of war damage, nationalization of property, and certain financial debts.<sup>2</sup> Like the Rumanian and Bulgarian lump sum agreements of 1960<sup>3</sup> and 1963,<sup>4</sup> upon which it is modeled, the Hungarian Agreement constitutes a unique development in international claims practice, for it follows the "preadjudication" <sup>5</sup> of most of the claims by the Foreign Claims Settlement Commission (FCSC),<sup>6</sup> a U.S. national claims commission acting pursuant to Title III of the International Claims Settlement Act.<sup>7</sup> Although the claims against the three former Axis satellites now have been settled internationally, other preadjudicated claims under Titles III (Soviet Union),<sup>8</sup> IV (Czechoslovakia),<sup>9</sup> and V (Cuba and China)<sup>10</sup> of the same

\* Of the Board of Editors.

<sup>1</sup> Agreement with Hungary, March 6, 1973, [1973] 1 UST 522, TIAS No. 7569, 1 R. LILICH & B. WESTON, *INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS* app. B (1975) [hereinafter cited as LILICH & WESTON]. Congress recently enacted legislation implementing the agreement. Pub. L. No. 93-460, §1, 88 Stat. 1386 (Oct. 20, 1974).

<sup>2</sup> Art. 2(1)-(3). Article 2(4) settles a mixed governmental and private claim. See text at notes 93-99 *infra*.

<sup>3</sup> Agreement with Rumania, March 30, 1960, [1960] 1 UST 317, TIAS No. 4451, 2 LILICH & WESTON 217. See Christenson, *The United States-Rumanian Claims Settlement Agreement of March 30, 1960*, 55 AJIL 617 (1961) [hereinafter cited as Christenson].

<sup>4</sup> Agreement with Bulgaria, July 2, 1963, [1963] 1 UST 969, TIAS No. 5387, 2 LILICH & WESTON 266. See Lillich, *The United States—Bulgarian Claims Agreement of 1963*, 58 AJIL 686 (1964) [hereinafter cited as Lillich].

<sup>5</sup> The term refers to the Foreign Claims Settlement Commission's unilateral determination of claims against a foreign country before the conclusion of a lump sum agreement with it. See R. LILICH, *THE PROTECTION OF FOREIGN INVESTMENT: SIX PROCEDURAL STUDIES* ch. V (1965).

<sup>6</sup> See generally R. LILICH, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* (1962).

<sup>7</sup> International Claims Settlement Act of 1949, as amended, 22 U.S.C. §1641 (1970).

<sup>8</sup> *Id.* The FCSC rendered 1,925 awards amounting to \$129,058,893, including \$70,466,019 in principal and \$58,592,874 in interest, against the Soviet Union for claims arising prior to November 16, 1933. See FCSC, Dec. & Ann. 297 (1968) [hereinafter cited as FCSC].

<sup>9</sup> International Claims Settlement Act of 1949, as amended, 22 U.S.C. §1642 (1970). See Lillich, *The Gravel Amendment to the Trade Reform Act of 1974: Congress Checkmates a Presidential Lump Sum Agreement*, to be published in a forthcoming issue of this JOURNAL.

act still remain outstanding. The present agreement, therefore, merits analysis not only in its own right, but also for what it reveals about the technique of preadjudication and the international claims settlement process generally.

## I.

### THE BACKGROUND OF THE AGREEMENT

Article 26(1) of the Treaty of Peace with Hungary, which entered into force on September 15, 1947, required Hungary to restore all legal rights and interests in Hungary of U.S. nationals as they existed on September 1, 1939, and to return all property in Hungary of U.N. nationals as it existed on September 15, 1947, the date of the treaty.<sup>11</sup> When property could not be returned or when, as a result of the war, it had been damaged, U.N. nationals were to receive from Hungary compensation "to the extent of two-thirds of the sum necessary, at the date of payment, to purchase similar property or to make good the loss suffered."<sup>12</sup> Claims of U.S. nationals clearly were covered by use of the term "United Nations nationals," defined to include

individuals who are nationals of any of the United Nations, or corporations or associations organised under the laws of any of the United Nations, at the coming into force of the present Treaty, provided that the said individuals, corporations or associations also had this status at the date of the Armistice with Hungary.<sup>13</sup>

Unfortunately for U.S. claimants, Hungary made little effort to fulfill its Peace Treaty obligations. Moreover, at the same time it was flouting these commitments, it embarked upon an extensive nationalization program which culminated in the taking of most U.S.-owned property.<sup>14</sup> With the U.S. Minister in Budapest estimating the value of potential claims at \$263,000,000,<sup>15</sup> Hungary failed to provide just, or indeed any, compensa-

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<sup>10</sup> International Claims Settlement Act of 1949, *as amended*, 22 U.S.C. §1643 (1970). See Murphy, *Claims Against the Republic of Cuba*, 27 U. MIAMI L. REV. 372 (1973), and Redick, *The Jurisprudence of the Foreign Claims Settlement Commission: Chinese Claims*, 67 AJIL 728 (1973).

<sup>11</sup> Treaty of Peace with Hungary, Feb. 10, 1947, Art. 26(1), 61 Stat. 2065, TIAS No. 1651, 4 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 453 (1970). See text accompanying note 16 *infra*.

<sup>12</sup> Art. 26(4)(a).

<sup>13</sup> Art. 26(9)(a).

<sup>14</sup> See Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COLUM. L. REV. 1125, 1152-54 (1948); *id.*, *Compensation for Nationalised Property in Post-War Europe*, 3 INT'L L.Q. 323, 338-39 (1950); Drucker, *The Nationalisation of United Nations Property in Europe*, in 36 TRANSACT. GROT. SOC'Y 75, 92-93 (1951); and Guttridge, *Expropriation and Nationalisation in Hungary, Bulgaria and Roumania*, 1 INT'L & COMP. L.Q. 14 *passim* (1952).

<sup>15</sup> Telegram from the Minister in Hungary to the American Delegation at the Council of Foreign Ministers in Paris, [1946] 6 FOREIGN REL. U.S. 284-85 (1969). Although the claims subsequently filed came to \$225,816,966, the FCSC rendered awards amounting to only \$80,296,047. FCSC 157. See text at note 32 *infra*.

tion as required by customary international law.<sup>16</sup> When Soviet airplanes forced an off-course C-47 to land in Hungary on November 19, 1951, diplomatic relations between the United States and Hungary reached a postwar low, and efforts to secure compensation had to be abandoned.<sup>17</sup>

During the 1950's, with Hungary refusing to compensate Peace Treaty and nationalization claimants, the United States finally resorted to self-help.<sup>18</sup> Pursuant to the Trading with the Enemy Act,<sup>19</sup> the United States already held certain Hungarian assets blocked under Executive Order 8389 of April 10, 1940.<sup>20</sup> It was under no international obligation to unblock, much less return, these assets, since "the use of seized property for the satisfaction of claims is expressly recognized in the Peace Treaties of February 10, 1947."<sup>21</sup> Proceeding on the premise that these assets were available to compensate both Peace Treaty and nationalization claimants,<sup>22</sup> Congress

<sup>16</sup> Rubin has argued that the Hungarian nationalizations violated not only customary international law, but also the Peace Treaty as well. Rubin, *The Almost-Forgotten Claimant: American Citizens' Property Rights Violated*, 40 A.B.A.J. 961, 962 (1954). But cf. Sipkov, *Postwar Nationalizations and Alien Property in Bulgaria*, 52 AJIL 469, 478 (1958), who contends that the identical Bulgarian Peace Treaty "does not contain any clauses guaranteeing that United Nations nationals will enjoy their property rights or in case of expropriation will be paid according to international law." In any event, customary international law requires the payment of just compensation. See generally 1-3 THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW *passim* (R. Lillich ed. & contrib. 1972-1975).

The position of the United States at the time was more realistic than legalistic. During the period of the armistice, it refused to recognize Hungary's right to nationalize property representing United Nations interests. Telegram from the Minister in Hungary to the American Delegation at the Council of Foreign Ministers in Paris, [1946] 6 FOREIGN REL. U.S. 285 (1969). See Telegram from the Secretary of State to the Legation in Hungary, [1947] 4 FOREIGN REL. U.S. 300-01 (1972). In principle, it maintained that Hungary continued to be similarly restricted under Article 26(1) of the Peace Treaty but, as a practical matter, it refrained from challenging Hungary's right to nationalize U.S. property and concentrated instead upon obtaining "prompt, adequate and effective" compensation. *Id.* at 366.

<sup>17</sup> For a brief description of the incident, see text accompanying note 93 *infra*. Shortly thereafter the United States ordered the closure of all Hungarian consulates in the United States. 26 DEPT. STATE BULL. 7 (1952).

<sup>18</sup> As it had in the case of Yugoslavia. See R. LILlich, *supra* note 6, at 106-08. See also text accompanying note 166 *infra*.

<sup>19</sup> Act of Oct. 6, 1917, ch. 106, 40 Stat. 411 (1917), as amended, 50 U.S.C. App. §§1-40 (1970).

<sup>20</sup> 3 C.F.R. 645 (comp. 1938-1943).

<sup>21</sup> M. DOMKE, *THE CONTROL OF ALIEN PROPERTY* 305 (1947). Article 29(1) of the Treaty of Peace reads:

Each of the Allied and Associated Powers shall have the right to seize, retain, liquidate or take any other action with respect to all property, rights and interests which at the coming into force of the present Treaty are within its territory and belong to Hungary or to Hungarian nationals, and to apply such property or the proceeds thereof to such purposes as it may desire, within the limits of its claims and those of its nationals against Hungary or Hungarian nationals, including debts, other than claims fully satisfied under other Articles of the present Treaty. All Hungarian property, or the proceeds thereof, in excess of the amount of such claims, shall be returned.

<sup>22</sup> See Rubin, *supra* note 16, at 1007-09. But see H.R. REP. No. 624, 84th Cong., 1st Sess. 13 (1955). As far back as 1947, Secretary of State Marshall had taken the position that the assets were available for distribution to all U.S. claimants. "Ultimate

in 1955 enacted Title II of the International Claims Settlement Act, authorizing the vesting and liquidation of assets of the Hungarian Government and Hungarian corporations.<sup>23</sup>

Simultaneously, Congress enacted Title III of the International Claims Settlement Act, which enabled the FCSC to adjudicate the claims of United States nationals against Hungary for its failure:

(1) to restore or pay compensation for property of United States nationals as required by Articles 26 and 27 of the Treaty of Peace;

(2) to pay effective compensation for the nationalization, compulsory liquidation or other taking, prior to August 9, 1955, of property of United States nationals; and

(3) to meet obligations expressed in currency of the United States arising out of contractual or other rights acquired by United States nationals prior to September 1, 1939, and which became payable prior to September 15, 1947.<sup>24</sup>

Eligible claimants under Title III were natural persons who were U.S. citizens, or who owed permanent allegiance to the United States, and corporations or other legal entities which had been organized in the United States and were more than 50 percent owned by such natural persons.<sup>25</sup> Claims by stockholders based upon direct or indirect interests in non-national corporations<sup>26</sup> were allowed only if the corporation which directly suffered the loss was at least 25 percent owned by natural persons who were U.S. nationals.<sup>27</sup> Congress later struck out the 25 percent requirement

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possibility should be kept in mind this connection that, should other means not be agreed upon, US might obtain at least partial compensation for land, together with other unsatisfied claims under Art 29, from Hun assets available to US under that Article of Treaty." Telegram from the Secretary of State to the Legation in Hungary, [1947] 4 FOREIGN REL. U.S. 366 (1972).

<sup>23</sup> International Claims Settlement Act of 1949, *as amended*, 22 U.S.C. §1631 (1970). By Executive Order 10644 of Nov. 8, 1955, 3 C.F.R. 281 (comp. 1954-1958), the President authorized the Attorney General to perform the functions granted to the President by Title II. See text at and accompanying notes 35 & 42 *infra*.

<sup>24</sup> See note 7 *supra*. Titles II and III established similar procedures with respect to Bulgaria and Rumania. See Clay, *Relief for War Victims: Recent Foreign Claims Legislation*, 42 A.B.A.J. 337 (1953), and Ujlaki, *Compensation for the Nationalization of American-Owned Property in Bulgaria, Hungary and Rumania*, 1 N.Y.L.F. 265 (1955).

<sup>25</sup> International Claims Settlement Act of 1949, *as amended*, 22 U.S.C. §1641(2) (1970). Compare the broader eligibility requirements of the Treaty of Peace in the text at note 13 *supra*.

<sup>26</sup> The term includes both foreign and ineligible U.S. corporations. Since a stockholder may have a compensable claim based upon his interest in the latter, *i.e.*, in a U.S. corporation which fails to meet the 50 percent test, the term is more accurate than the traditional but unduly narrow one of "foreign" corporation, used loosely by the FCSC in the past. See, *e.g.*, SETTLEMENT OF CLAIMS BY THE FOREIGN CLAIMS SETTLEMENT COMMISSION OF THE UNITED STATES AND ITS PREDECESSORS 224 (1955).

<sup>27</sup> International Claims Settlement Act of 1949, *as amended*, Act of Aug. 9, 1955, ch. 645, 69 Stat. 573 (1955). Of course, if the corporation itself was an eligible claimant, its stockholders were barred from bringing claims. International Claims

insofar as claims based upon *direct* stock ownership in *nationalized* corporations were concerned.<sup>28</sup>

In a four-year period before the statutory deadline of August 9, 1959,<sup>29</sup> the FCSC received and determined, "in accordance with applicable substantive law, including international law,"<sup>30</sup> the validity and amount of 2,725 claims against Hungary.<sup>31</sup> It rendered 1,153 awards amounting to \$80,296,047,<sup>32</sup> including \$58,181,408 in principal<sup>33</sup> and \$22,114,639 in interest.<sup>34</sup> With only \$2,237,737.96 available in the Hungarian Claims Fund,<sup>35</sup>

Settlement Act of 1949, *as amended*, 22 U.S.C. §1641j(a) (1970). Compare the seemingly more liberal eligibility requirements of the Treaty of Peace in the text at note 13 *supra*.

<sup>28</sup> International Claims Settlement Act of 1949, *as amended*, 22 U.S.C. §1641j(b) (1970). "The effect of this amendment was that the prerequisite of 25% United States interest applied only in cases where the claim was based upon *indirect* ownership interest in the corporation which sustained the loss, such as ownership of stock in a Belgian corporation which in turn owned stock in a [Hungarian] corporation." FCSC 184. Also, it "related only to [nationalization] claims under Section 303(2) of the Act. Thus, where [Peace Treaty] claims under Section 303(1) of the Act were involved, the original provisions . . . applied, irrespective of whether the interests in the corporations in question were direct or indirect." FCSC, TENTH SEMIANN. REP. 121 (1959).

<sup>29</sup> International Claims Settlement Act of 1949, *as amended*, 22 U.S.C. §1641o (1970). "The claims program was completed on August 9, 1959, as specifically provided under the terms of the enabling statute." *Hearing on the United States-Hungarian Claims Agreement Before the Senate Comm. on Foreign Relations*, 93d Cong., 2d Sess. 2 (1974) (statement of Wayland D. McClellan, General Counsel, FCSC) [hereinafter cited as *Senate Hearing*].

<sup>30</sup> International Claims Settlement Act of 1949, *as amended*, 22 U.S.C. §1641b (1970).

<sup>31</sup> FCSC 157. By way of comparison, the Commission handled only 1,464 claims against Bulgaria and Rumania combined. *Id.* at 157-58.

<sup>32</sup> *Id.* at 157. The FCSC's opinions in the most important Hungarian claims may be found in FCSC, TENTH SEMIANN. REP. 27-87 (1959). Selected opinions also may be found in FCSC 159-264 *passim*.

<sup>33</sup> *Id.* at 157.

<sup>34</sup> *Id.* The FCSC allowed interest on nationalization and financial debt claims to August 9, 1955. *Id.* at 190-97. In recent testimony before Congress, representatives of the FCSC did not mention the interest outstanding and the Congressmen present did not raise the point. *Senate Hearing 2* (statement of Wayland D. McClellan, General Counsel, FCSC); *Hearing on Hungarian Claims Legislation Before the Subcomm. on Europe of the House Comm. on Foreign Affairs*, 93d Cong., 2d Sess. 4 (1974) (statement of J. Raymond Bell, Chairman, FCSC) [hereinafter cited as *House Hearing*]. Excluding interest from the compensation calculation naturally inflates the percentage return supposedly obtained under the present agreement. Compare text at note 156 *infra* with text at and accompanying note 165 *infra*.

<sup>35</sup> *Senate Hearing 2* (statement of Wayland D. McClellan, General Counsel, FCSC); *House Hearing 5* (statement of J. Raymond Bell, Chairman, FCSC). This figure represents the net amount in the Hungarian Claims Fund "[a]fter deducting an amount equivalent to 5 percent of the proceeds for reimbursement to the United States for expenditures incurred by the Commission in carrying out its functions with respect to these claims. . . ." *Id.* Cf. Rubin, *supra* note 16, at 1007 n.4.

Other figures on the amount of the fund vary. The FCSC, for instance, previously had given it as \$1,653,647.09. FCSC 157. See Freidberg & Lockwood, *The Measure of Damages in Claims Against Cuba*, in 1 THE VALUATION OF NATIONALIZED PROPERTY

claimants holding awards over \$1,000 received a meagre 1.5 percent of their awards.<sup>36</sup> This partial payment, however, was not to "extinguish such claim[s], or to be construed to have divested any claimant, or the United States on his behalf, of any rights against the appropriate foreign government or national for the unpaid balance of his claim or for restitution of his property."<sup>37</sup> Accordingly, after an additional delay of six years, formal negotiations were begun in 1965 to obtain compensation for the balance of the claims.<sup>38</sup>

## II.

### THE GENERAL PROVISIONS OF THE AGREEMENT

Under the terms of the Hungarian Agreement, the United States accepted a lump sum of \$18,900,000 as full and final settlement of claims against Hungary amounting to \$80,296,047.<sup>39</sup> The lump sum is to be paid in twenty equal annual installments of \$945,000, beginning on June 30, 1973.<sup>40</sup> In return, the United States agreed to waive, upon full payment of the lump sum, all claims referred to in Article 2 of the agreement, whether or not they had been brought to Hungary's attention.<sup>41</sup> As further quid

IN INTERNATIONAL LAW 116, 130 (R. Lillich ed. & contrib. 1972). Article 6(2)(ii) of the present agreement, on the other hand, fixes it at \$3,318,614. See S. REP. No. 93-1095, 93d Cong., 2d Sess. 2 (1974).

<sup>36</sup> Under the provisions of Title III, the principal amounts of awards under \$1,000 were paid in full, "plus approximately 1.5 percent of the principal amounts of awards in excess of \$1,000." *Senate Hearing 2* (statement of Wayland D. McClellan, General Counsel, FCSC). *Accord, House Hearing 5* (statement of J. Raymond Bell, Chairman, FCSC). A former FCSC Commissioner previously had given a general figure of 2.8 percent. Freidberg & Lockwood, *supra* note 35, at 130.

<sup>37</sup> International Claims Settlement Act of 1949, *as amended*, 22 U.S.C. §1641l (1970).

<sup>38</sup> S. REP. No. 93-1095, 93d Cong., 2d Sess. 2 (1974). The preadjudication of Hungarian claims prior to the negotiation of the present agreement naturally placed certain political, if not constitutional, limitations upon the Department of State's traditional freedom in the negotiating process. See Lillich 690-91. *Accord*, Christenson 620-21, 632.

<sup>39</sup> Art. 1(1). See note 32 *supra*. In addition to paying \$18,900,000, Hungary also agreed to relinquish all claims it may have had in respect of vested assets valued at \$3,318,614. Art. 6(2)(ii). See text at and accompanying note 35 *supra*. Hence the total amount of compensation available for distribution eventually should reach \$22,218,614. *Senate Hearing 29*.

<sup>40</sup> Art. 4(1). Hungary has paid two installments of \$945,000 and \$984,000 in 1973 and June 1974 respectively. "The increased amount [of the second installment] is the result of a payment accelerator clause in [Article 4(2) of] the agreement based upon Hungarian exports to the United States." *House Hearing 2* (statement of Fabian A. Kwiatek, Assistant Legal Adviser, Department of State). See text at and accompanying note 168 *infra*.

<sup>41</sup> Art. 6(1). Moreover, under Article 6(3):

neither Government will present to the other on its behalf or on behalf of any person included in the definition of United States or Hungarian nationals any claims which have been referred to in this Agreement and neither Government will support such claims. In the event that such claims are presented directly by nationals of one country to the Government of the other, such Government will refer them to the Government of the national concerned.

pro quos, it also agreed to release "its blocking controls over all Hungarian *accounts* in the United States,"<sup>42</sup> and to seek authority from Congress to accord most-favored-nation treatment to Hungarian products.<sup>43</sup> The distribution of the lump sum falls within the exclusive competence of the United States "in accordance with its legislation,"<sup>44</sup> without any responsibility arising therefrom on Hungary's part.<sup>45</sup>

The four categories of claims settled and discharged by Article 2 of the Hungarian Agreement comprise claims for:

- (1) property, rights and interests affected by Hungarian measures of nationalization, compulsory liquidation, expropriation, or other taking on or before the date of this Agreement, excepting real property owned by the Government of the United States;
- (2) obligations expressed in currency of the United States arising out of contractual or other rights acquired by nationals of the United States prior to September 1, 1939, and which became payable prior to September 15, 1947;

<sup>42</sup> Art. 8 (emphasis added). Compare Articles 6 and 4 of the Rumanian and Bulgarian lump sum agreements respectively, where the United States agreed to unblock all their remaining *property* in the United States. Presumably, most of this property consisted of the assets of natural persons residing in Rumania or Bulgaria, whose assets had not been vested or liquidated pursuant to Title II. See text at note 23 *supra*. In the case of Hungary, such assets once were estimated at \$2,683,189. Rubin, *supra* note 16, at 1007 n.4. Since 1960, when payments from blocked accounts were licensed, this amount has been run down to "approximately \$1 million." *Senate Hearing* 31 (letter from Marshall Wright, Acting Assistant Secretary for Congressional Relations, to Senator Fulbright). See text at note 167 *infra*.

<sup>43</sup> See text at and accompanying note 169 *infra*.

<sup>44</sup> Art. 5. This phrase refers to Title III, which authorized preadjudication, and to the legislation implementing the agreement providing for the FCSC's adjudication of certain additional claims. See text at notes 63-64 & 93-99 *infra*. Additional legislation was needed to enable the FCSC to handle such claims, since under Title I it was without jurisdiction to adjudicate claims after lump sum agreements with "governments against which the United States declared the existence of a state of war during World War II. . . ." International Claims Settlement Act of 1949, *as amended*, 22 U.S.C. §1623(a) (1970).

It is worth noting that a frequently overlooked 1896 statute gives the Department of State authority to perform this function if it so desires. Act of Feb. 27, 1896, ch. 34, 29 Stat. 32 (1896), 31 U.S.C. §547 (1970). See R. LILLICH, *supra* note 6, at 35 n.121. *But cf. House Hearing* 2 (statement of Fabian A. Kwiatek, Assistant Legal Adviser, Department of State): "The first amendment in the proposed bill . . . will transfer the funds received under the agreement into the Hungarian Claims Fund. Unless such action is taken, the lump-sum settlement fund cannot be used to pay any claim."

<sup>45</sup> Art. 5. Like its two counterparts, but unlike Article 5A of the Agreement with Poland, July 16, 1960, [1960] 2 UST 1953, TIAS No. 4545, 2 LILLICH & WESTON 227, and Article 4 of the Agreement with Yugoslavia, Nov. 5, 1964, [1965] 1 UST 1, TIAS No. 5750, 2 LILLICH & WESTON 308, the present agreement omits any undertaking by the foreign country to furnish all documents in its possession necessary to a just determination of the claims. While most of the claims under the Hungarian Agreement already have been determined, making such an undertaking superfluous as to them, it might have facilitated the task of new nationalization claimants who still have to establish their right to awards before the FCSC. See text at notes 63-64 *infra*.



(3) obligations of the Hungarian People's Republic under Articles 26 and 27 of the Treaty of Peace between the United States and Hungary dated February 10, 1947, and

(4) losses referred to in the note of December 10, 1952 of the Government of the United States to the Government of the Hungarian People's Republic.

The first three categories, which closely parallel the claims covered by the Rumanian and Bulgarian lump sum agreements,<sup>46</sup> correspond to those claims previously determined under Title III.<sup>47</sup> As in the case of its two predecessors, however, there are several notable differences between the terms of the Hungarian Agreement governing these categories and the provisions of Title III. Moreover, the fourth category clearly is a sport: "losses referred to in the note of December 10, 1952" is an oblique reference to mixed governmental and private claims arising from the 1951 aerial incident involving the off-course C-47.<sup>48</sup>

*Peace Treaty Claims.*<sup>49</sup> Under Title III, the treaty test of eligibility—possessing U.N. nationality—was superseded by the more restrictive requirement of U.S. nationality, which the FCSC invoked to deny awards to persons otherwise entitled to war damage compensation under the Treaty of Peace.<sup>50</sup> The arbitrary introduction in Title III of the 50 and 25 percent U.S. interest requirements for corporate and stockholder claims further precluded possible claims by such persons.<sup>51</sup>

While Articles 1 and 2 of the Rumanian Agreement closely followed the restrictive provisions of Title III,<sup>52</sup> Article 1(2) of the Bulgarian Agreement,

<sup>46</sup> Arts. 1(1) of the Rumanian and Bulgarian lump sum agreements.

<sup>47</sup> See text at note 24 *supra*.

<sup>48</sup> See the Negotiating Record Regarding the 1951 Aerial Incident attached to the Hungarian Agreement, note 97 *infra*.

<sup>49</sup> In an Exchange of Notes constituting Annex B, Hungary states, with reference to these claims, "that all the obligations of the Government of the Hungarian People's Republic set out in Article 27 of the Treaty of Peace with Hungary signed in Paris on February 10, 1947 have already been fulfilled." In its reply, the United States records that it "has taken note of [this] statement," diplomatic language indicating disagreement with it. For other lump sum agreements concluded by Hungary containing similar caveats, see the Canadian-Hungarian Agreement, June 1, 1970, [1970] Can. T.S. No. 17, 1 LILICH & WESTON app. B; the Dutch-Hungarian Agreement, July 2, 1965, [1965] Trb. nr. 181, 564 UNTS 49, 2 LILICH & WESTON 316; and the Norwegian-Hungarian Agreement, Feb. 22, 1957, [1957] St. prp. nr. 64, 2 LILICH & WESTON 147.

<sup>50</sup> See text at notes 13 & 25 *supra*. FCSC 159-68. This requirement has been carried over into Article 2 of the Hungarian Agreement. Other countries concluding lump sum agreements with Hungary have required their nationality only at the date of the agreement, thus allowing war damage claimants to benefit from the Peace Treaty's more liberal eligibility provisions. See, e.g., Article 3(1) of the Canadian-Hungarian Agreement, note 49 *supra*.

<sup>51</sup> See text at and accompanying notes 25-28 *supra*. FCSC 180-85.

<sup>52</sup> "Comparing the foregoing domestic law with the settlement agreement, which necessarily incorporates the nationality and ownership provisions of [Title III], it is evident that any United States claimants with rights under the Treaty of Peace can receive nothing more than was provided under that law." Christenson 629.

presumably to avoid some of the discrepancies that troubled its predecessor,<sup>53</sup> provided only that all claims must have been "owned by nationals of the United States of America," omitting any reference to percentage requirements such as are found in Title III.<sup>54</sup> This surprising omission, which created at least as many problems as it solved,<sup>55</sup> has been repeated in large part under the present agreement. Article 3(1)(b), while it does reiterate the 50 percent requirement for corporate claims, makes no mention whatsoever of stockholder claims, thus reverting to the Peace Treaty approach in this regard.<sup>56</sup> The implication of this lacuna, theoretically at least, is that all stockholder claims in corporations having suffered war damage are compensable under the Hungarian Agreement, even claims previously denied by the FCSC pursuant to Title III's 25 percent requirement.<sup>57</sup> As a practical matter, the chances of such claimants obtaining awards at this late date appear nil, since the drafters of the agreement surely had no such intention and the implementing legislation offers no encouragement.

Another omission concerning Peace Treaty claimants occurs in the agreement. Unlike the Treaty of Peace<sup>58</sup> and Title III,<sup>59</sup> it contains no provision restricting awards in such claims to two-thirds of the loss or damage actually sustained. However, as in the case of its Rumanian and Bulgarian counterparts,<sup>60</sup> the reference in the Hungarian Agreement to claims "under Articles 26 and 27 of the Treaty of Peace" presumably incorporates by reference the limitation on damages contained therein.<sup>61</sup>

*Nationalization Claims.* Title III authorized the preadjudication of claims of U.S. nationals for the nationalization, compulsory liquidation, or other taking of their property in Hungary prior to August 9, 1955.<sup>62</sup> The present agreement settles these claims and also similar claims which arose between that date and March 6, 1973, the date of the agreement.<sup>63</sup> The

<sup>53</sup> See Lillich 697-98.

<sup>54</sup> *Id.* at 693.

<sup>55</sup> *Id.* at 703-04.

<sup>56</sup> See text at note 13 *supra*.

<sup>57</sup> But see Christenson 629: "If there are any [peace] treaty claimants who were ineligible under [Title III], the agreement should not be used as an argument to seek any greater rights than Congress has already provided after careful consideration."

<sup>58</sup> See note 12 *supra*.

<sup>59</sup> International Claims Settlement Act of 1949, *as amended*, 22 U.S.C. §1641b(1) (1970).

<sup>60</sup> See Article 1(1)(a) of the Agreements with Rumania and Bulgaria, notes 3 & 4 *supra*.

<sup>61</sup> Since Peace Treaty claimants will receive nowhere near two-thirds of their awards under the Hungarian Agreement anyway, the limitation point is of academic interest only. Of more practical importance is the provision contained in the implementing legislation prohibiting any further payments to be made on war damage awards until all other awards have been paid in equal proportions to such awards. See text accompanying note 164 *infra*. For the approach of other countries to this problem, see 1 LILlich & WESTON ch. V n.201.

<sup>62</sup> See text at note 24 *supra*.

<sup>63</sup> Art. 2(1). On the constitutionality of such provisions in lump sum agreements and in legislation implementing them, see *Avramova v. United States* 354 F. Supp. 420 (S.D.N.Y. 1973).

In an Exchange of Notes constituting Annex A, Hungary states, with reference to nationalization claims which arose subsequent to August 9, 1955, "that this settlement

Department of State has indicated that these new nationalization claims "are relatively few in number and are estimated not to amount to over \$400,000."<sup>64</sup>

One of the most interesting provisions in the Hungarian Agreement, found in Annex D, relates to claims based upon debts owed by nationalized corporations. The FCSC, preadjudicating nationalization claims under a Title III provision almost identical to the one contained in the agreement, was instructed to decide "in accordance with applicable substantive law, including international law."<sup>65</sup> Applying its statutory standard, the FCSC held that such claims, whether secured or unsecured, were not compensable under Title III.<sup>66</sup> Since this holding conflicts with present trends in

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in no way constitutes a precedent for the Government of the Hungarian People's Republic for similar claims arising after the date of this Agreement." In its reply, the United States confirms this curious and seemingly harmless understanding. *Compare* text at and accompanying note 176 *infra*.

*Quaere*: Was the above Exchange of Notes sought by Hungary in view of its conclusion of follow-up lump sum agreements with other countries? *Compare* the French-Hungarian Agreement of 1950, June 12, 1950, [1952] J.O. 9260, [1952] Rev. Crit. D.I.P. 780, 2 LILlich & WESTON 45, with the French-Hungarian Agreement of 1965, May 14, 1965, [1965] J.O. 6308, [1965] Rev. Gen. D.I.P. 901, 2 LILlich & WESTON 311, and the Swedish-Hungarian Agreement of 1951, March 31, 1951, [1951] S.O. No. 16, 2 LILlich & WESTON 56, with the Swedish-Hungarian Agreement of 1966, Sept. 12, 1966, *id.* at 113.

<sup>64</sup> *Senate Hearing* 31 (letter from Marshall Wright, Acting Assistant Secretary for Congressional Relations, to Senator Fulbright). The FCSC, on the other hand, has estimated that there are "about 600-plus" such claims. *House Hearing* 8 (statement of Wayland D. McClellan, General Counsel, FCSC).

The legislation implementing the agreement provides that, in addition to new nationalization claimants, claimants mailed notices with respect to filing claims against Hungary under Title III "who did not receive the notice as the result of administrative error in placing a nonexistent address on the notice, may file with the Commission a claim. . . ." *See* note 1 *supra*. This special interest amendment, opposed by the FCSC, was added to cover several claimants, now represented by former Senator Frank J. Lausche, whose claims arose prior to August 9, 1955, but who had failed to file them in timely fashion under Title III. *Senate Hearing* 7-19. No other old nationalization claims, *i.e.*, claims arising prior to August 9, 1955, may be filed at this time. *See* S. REP. No. 93-1095, 93d Cong., 2d Sess. 3-4 (1974). Of course, old nationalization claimants holding awards under Title III are eligible for additional compensation. *See* text at and accompanying note 164 *infra*.

<sup>65</sup> *See* text at note 30 *supra*.

<sup>66</sup> FCSC 246. According to the Commission:

It has not been demonstrated to the Commission, and the Commission's own research has not established, that international law requires a payment of compensation to a creditor when the debtor or the debtor's property has been nationalized or otherwise taken. Quite to the contrary, the weight of authority is to the effect that such losses as a creditor may suffer as a result of a wrongful act committed against his debtor are too remote or indirect to sustain an award to the creditor.

*Id.* at 252. *Compare* the forceful dissenting opinion in this claim by Commissioner Pace:

It is an anachronism, in my opinion, to deny the instant claim on the basis of so-called traditional reluctance of international tribunals to look with favor upon claims based on secured creditor interests. Such decisions have always been founded on the theory that any losses sustained by the creditor were too remote, or indirect, and were not the proximate result of the wrongful act forming the

state practice,<sup>67</sup> as well as with at least one other lump sum agreement concluded by the United States,<sup>68</sup> it was hoped that subsequent settlements would clarify whether debt claimants fell within or without the traditional language providing compensation for the nationalization or other taking of property, rights, and interests. Unfortunately, both the Rumanian and Bulgarian lump sum agreements were silent on the point, leaving such claimants in an unenviable position.<sup>69</sup>

Annex D, while establishing a most unsatisfactory precedent which will return to haunt U.S. negotiators in the future,<sup>70</sup> at least leaves no doubt about where debt claimants stand under the Hungarian Agreement. In an Exchange of Notes, the United States agrees not to espouse claims "based upon debts owed by enterprises nationalized by the Government of the Hungarian People's Republic. This understanding, however, does not exclude the possibility of such claimants presenting their claims to appropriate authorities in Hungary." It is doubtful whether much can be expected from this presentation of private grievances. Surely the failure

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basis of the claim. There is nothing remote or indirect, in my opinion, about the loss sustained by a mortgagee when the property securing his mortgage was nationalized under conditions which have prevailed in Hungary since 1946. Moreover, the total lack of due process in the nationalization program of the present government of Hungary demands, it seems to me, that the precedents cited by the majority of the Commission be distinguished from the situation herein, for the decisions were rendered in an atmosphere which assumed the existence of all of the rights and remedies which nations have customarily afforded.

*Id.* at 257-58. Commissioner Pace, it is interesting to note, was not a lawyer, much less an international one.

<sup>67</sup> According to Christenson, the dissent rather than the holding in the above claim "appears to reflect the correct rule of international law, that a secured creditor interest constitutes an interest in property which may be taken when the debtor corporation is nationalized." Christenson 631 n.63. For recent state practice supporting this view, see 1 LILlich & WESTON ch. IV, Part B. See also text at and accompanying notes 68 & 142-43 *infra*.

<sup>68</sup> Article 2(c) of the Agreement with Poland, note 45 *supra*, specifically covers claims for "debts owed by enterprises which have been nationalized or taken by Poland and debts which were a charge upon property which has been nationalized, appropriated or otherwise taken by Poland." Poland has concluded lump sum agreements with other countries containing similar provisions. See, e.g., Article 1(2) of the Canadian-Polish Agreement, Oct. 15, 1971, [1971] Can. T.S. No. 39, 1 LILlich & WESTON app. B.

<sup>69</sup> Discussing the Bulgarian Agreement, the present writer pointed out that

[a]ssuming, *arguendo*, that the Department of State should undertake to espouse these claims [in the future], Bulgaria could admit their international validity under modern claims practice and plead their settlement by the agreement. If the Department then argued that they were not settled, perforce on the Commission's ground that the claims were not valid under international law, Bulgaria would respond that in this case its international liability never had been engaged at all. The failure to spell out in the agreement whether these claimants were included or excluded therefore places them in an unprofitable vicious circle. Even if their claims had been written out of the agreement they would have been in no worse position than they are now, since then Bulgaria would not have been able to rely upon the broad waiver clause found [therein].

Lillich 696.

<sup>70</sup> Under Title V the FCSC has preadjudicated many debt claims against Cuba and China, which politically if not constitutionally the Department of State must seek to satisfy under eventual lump sum agreements. The present agreement, to say the least, will be most unhelpful in this regard. See text accompanying note 38 *supra*.

of the United States to obtain compensation for debt claimants, as other countries have done during negotiations with Hungary,<sup>71</sup> constitutes one of the major weaknesses in the Hungarian Agreement.

*Financial Debt Claims.* Title III specifically authorized one class of creditor claims: claims based upon obligations expressed in U.S. currency arising out of contractual or other rights acquired by U.S. nationals prior to September 1, 1939, and which became payable prior to September 15, 1947.<sup>72</sup> Article 2(2) of the present agreement restates the statute, negating any conflict about its scope.<sup>73</sup> As construed by the FCSC, most of these claims involved dollar bonds issued by the Hungarian Government.<sup>74</sup> Claims based upon bonds of political subdivisions and private banking institutions were not allowed.<sup>75</sup>

In applying Title III to claims based upon contractual obligations, the FCSC decided that awards "may include only unpaid amounts which by the terms of the bond contract were payable prior to September 15, 1947, and may not include any amounts which became payable thereafter."<sup>76</sup> Awards were made when there had been a default of the entire obligation, *i.e.*, when a bond had matured prior to the above date, and when there been a default in partial performance, *i.e.*, when installments of principal and interest accruing before the above date were unpaid.<sup>77</sup> Claims based upon contracts providing for the acceleration of the principal amounts of bonds were allowed if there had been a timely invocation of the acceleration provisions.<sup>78</sup> While claims based upon obligations expressed in foreign currencies were not compensable,<sup>79</sup> they were admitted if the bond contract provided for alternative payment in dollars.<sup>80</sup> The FCSC allowed interest on financial debt claims at the rate of 6 percent from the respective due dates of the obligations to August 9, 1955, the effective date of Title III.<sup>81</sup>

Like its predecessors, the Hungarian Agreement also contains an Exchange of Notes, Annex E, in which Hungary, noting the interest expressed by the United States in "the settlement of outstanding dollar bonds issued by predecessor Hungarian governments, *municipalities* and Hungarian financial *institutions*,"<sup>82</sup> confirms "its intention to settle the problem of this

<sup>71</sup> See text at notes 142-43 *infra*.

<sup>72</sup> See text at note 24 *supra*.

<sup>73</sup> Legislation implementing the agreement specifically prohibits further payments to two types of creditor claimants who received awards under Title III and thereby fall nominally under Article 2(2). For discussion of this unique prohibition, see text at notes 82-92 *infra*.

<sup>74</sup> FCSC 244. "The term 'obligations . . . arising out of contractual or other rights,' as used in [Title III], was not limited to bonds . . . , but also included other types of government obligations." *Id.* at 245.

<sup>75</sup> *Id.* at 260-62.

<sup>76</sup> FCSC, TENTH SEMIANN. REP. 29 (1959).

<sup>77</sup> *Id.* See FCSC 244.

<sup>78</sup> *Id.* at 237.

<sup>79</sup> *Id.* at 245.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 197.

<sup>82</sup> Emphasis added. The FCSC, it will be recalled, denied claims based upon the bonds of the italicized entities under Title III. See text at note 75 *supra*. While the present agreement does not render them compensable, at least it includes a commitment

bonded indebtedness by direct talks with American bondholders or their representatives."<sup>83</sup> While this provision impliedly bars *Title III* bondholders with awards totaling \$178,671<sup>84</sup> from securing additional compensation under the agreement,<sup>85</sup> their exclusion is offset, at least in part, by Hungary's promise not only to settle their claims but the claims of *all* bondholders in the future.<sup>86</sup> No such inclusive commitment, it will be recalled, was obtained from either Rumania or Bulgaria under their lump sum agreements.<sup>87</sup>

In addition to bondholders, another type of *Title III* creditor claimant has been denied the benefits of the Hungarian Agreement, although in this instance their exclusion is nowhere apparent from its text. Buried in the legislation implementing the agreement is a clause which specifically bars additional payments to the "Standstill Creditors,"<sup>88</sup> claimants whose awards

by Hungary to settle them along with the bonds of the Hungarian Government. See text at notes 83 and 86 *infra*.

Note also that Annex E's reference to dollar bonds does not contain the limitation, found in the Exchanges of Notes accompanying the Rumanian and Bulgarian lump sum agreements, that the bonds must have been payable in the United States. See Christenson 633 and Lillich 697.

<sup>83</sup> "Such discussions are now taking place between the Government of Hungary and the Foreign Bondholders Protective Council." *House Hearing* 3 (statement of Fabian A. Kwiatek, Assistant Legal Adviser, Department of State).

<sup>84</sup> *Senate Hearing* 29 (letter from Marshall Wright, Acting Assistant Secretary for Congressional Relations, to Senator Fulbright). But see H.R. REP. NO. 93-1027, 93d Cong., 2d Sess. 2 (1974), which refers to "\$3.3 million in Kingdom of Hungary bonds."

<sup>85</sup> The legislation implementing the agreement makes this point explicitly. "[T]he Secretary of the Treasury shall not authorize any further payments on account of awards . . . based on Kingdom of Hungary bonds expressed in United States dollars. . . ." See note 1 *supra*. Compare text accompanying note 87 *infra*.

<sup>86</sup> This development constitutes a welcome step in the direction of treating all bondholder claimants alike. Cf. 1 LILlich & WESTON ch. IV, Part B.

<sup>87</sup> See Christenson 633-34 and Lillich 697. It is fair comment that neither of these articles properly developed the principal point of this paragraph, namely, that Exchanges of Notes in each case effectively excluded *Title III* bondholder claimants from further payments under these agreements. The legislation implementing the Rumanian and Bulgarian lump sum agreements certainly did not make this point clear. Compare text at and accompanying note 85 *supra*. For possible constitutional complications, see text at and accompanying note 92 *infra*.

<sup>88</sup> See *House Hearing* 9:

Mr. Rosenthal. What is a Standstill Creditor?

Mr. Kwiatek. The Standstill Creditors claims are claims which arose from credits which were extended by certain American banks to several Hungarian Credit Institutions during 1928 to 1931. These loans which were extended were guaranteed by the Government of Hungary.

They were paid regularly up to 1941. In 1941 they defaulted on these obligations. Since 1941 until 1969, there was no payment. This comprises roughly about \$6 million which was outstanding and upon which amount the Standstill Creditors based their agreement directly with the Government of Hungary.

The clause provides that "the Secretary of the Treasury shall not authorize any further payments on account of awards . . . to Standstill creditors of Hungary that were the subject matter of the agreement of December 5, 1969, between the Government of Hungary and the American Committee for Standstill creditors of Hungary." See note 1 *supra*.

under Title III totaled \$3,210,422.<sup>89</sup> The reason for the clause is as straightforward as it is unique: these claims already have been settled by a separate agreement concluded between the American Committee for the Standstill Creditors and the Hungarian Government on December 5, 1969.<sup>90</sup> While the prevention of "double payment on such claims" is laudable,<sup>91</sup> to eliminate the possibility of reverse-twist *Seery* arguments it would have been far preferable to have had their exclusion acknowledged in an Exchange of Notes to the agreement rather than left to subsequent domestic legislation.<sup>92</sup>

*Aerial Incident Claims.* In addition to the three classes of claims originally determined by the FCSC under Title III and subsequently settled by the Rumanian, Bulgarian, and now the Hungarian lump sum agreements, Article 2(4) of the present agreement contains a unique fourth category of claims, namely, mixed governmental and private claims arising from the 1951 aerial incident.<sup>93</sup> While other countries frequently negotiate the

<sup>89</sup> *Senate Hearing* 29 (letter from Marshall Wright, Acting Assistant Secretary for Congressional Relations, to Senator Fulbright).

<sup>90</sup> See text accompanying note 88 *supra*. Details of this separate agreement have not been made public. Since their preadjudicated awards amounted to \$3,210,422, see text at note 89 *supra*, the Standstill Creditors will have been treated more favorably than other claimants against Hungary if, in addition to the compensation they already have received from vested assets, compensation payable under the separate agreement exceeds \$1,236,012. See text at notes 36 *supra* & 156 *infra* (other claimants have been paid 1.5 percent of their awards and can anticipate eventual 40 percent payment).

<sup>91</sup> S. REP. No. 93-1095, 93d Cong., 2d Sess. 3 (1974).

<sup>92</sup> In *Seery v. United States*, 127 F. Supp. 601 (Ct. Cl. 1955), the Court of Claims held that the part of an executive agreement which withdrew a claimant's right of action against the United States was unconstitutional, since it in effect took her property without due process of law. See Oliver, *Executive Agreements and Emanations from the Fifth Amendment*, 49 AJIL 362 (1955). Here, with the text of the present agreement nominally covering the claims of Standstill Creditors, it could be argued that the implementing legislation was unconstitutional, since it specifically prevents them from receiving compensation to which they otherwise would be entitled under an executive agreement. Presumably this argument was anticipated and met by providing in the separate agreement of 1969 that the Standstill Creditors waived any nominal rights they might acquire under a subsequent lump sum agreement with Hungary. Still, an Exchange of Notes along the lines recommended in the text would have removed any possible constitutional complications. For other lump sum agreement problems raised by *Seery*, see Lillich 690-91.

<sup>93</sup> On November 19, 1951, Russian interceptors forced down an off-course C-47 near Papa, Hungary. The four man crew was held incommunicado until December 3, 1951, when they were turned over to Hungarian authorities. After being tried, convicted, and fined \$123,605.15, they were released on December 28, 1951, upon payment of the fine. The plane and its cargo of freight, however, were confiscated. The incident is described in detail in 27 DEPT. STATE BULL. 980-84 (1952). See also Lissitzyn, *The Treatment of Aerial Intruders in Recent Practice and International Law*, 47 AJIL 559, 581-85 (1953).

The United States, in separate notes dated March 17, 1953, presented formal claims against the Russian and Hungarian Governments amounting to \$637,894.11, computed as follows: (1) Cost of plane, equipment, and cargo, \$98,779.29; (2) Fine paid for release of crew, \$123,605.15; (3) Damages to crew for unlawful detention, mistreatment, and denial of justice, \$200,000; and (4) Damages to the United States,

inclusion of purely governmental claims in their lump sum agreements,<sup>94</sup> with two minor exceptions the United States has refrained from this practice.<sup>95</sup> Earmarking \$125,000 out of the lump sum to compensate the United States *qua* United States,<sup>96</sup> as specified in the Negotiating Record Regarding the 1951 Aerial Incident<sup>97</sup> and required by the legislation implementing the Hungarian Agreement,<sup>98</sup> naturally has the unfortunate effect of reduc-

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\$215,509.67. See *Senate Hearing* 32 (letter from Marshall Wright, Acting Assistant Secretary for Congressional Relations, to Senator Fulbright). Thereafter, on February 16, 1954, the United States instituted proceedings against the two countries in the International Court of Justice. Since both countries refused to submit to the ICJ's jurisdiction, the Court removed the cases from its list. Treatment in Hungary of Aircraft and Crew of United States of America, [1954] ICJ 99, 103.

According to the Department of State:

The 1951 aerial incident claim was included in this settlement agreement because both [Governments] desired to remove as many irritants as possible in the relations between the two countries, and the time was propitious to settle this incident. Additionally, the two Governments had discussed the settlement of this matter in the past in the context of a claims settlement agreement.

*Senate Hearing* 32 (letter from Marshall Wright, Acting Assistant Secretary for Congressional Relations, to Senator Fulbright).

<sup>94</sup> See 1 LILlich & WESTON ch. II, Part E.

<sup>95</sup> Article 1(b) of the United States-Panamanian Agreement, Jan. 26, 1950, [1950] 1 UST 685, TIAS No. 2129, 2 LILlich & WESTON 35, specifically settled for \$3,156 "[t]he claims of the United States of America against the Republic of Panamá for personal injuries sustained by six soldiers of the United States Army during disturbances which occurred in the city of Panama in the year 1915. . . ." The FCSC also interpreted Article 1(a) of the United States-Yugoslav Agreement of 1948, July 19, 1948, 62 Stat. 2658, TIAS No. 1804, 2 LILlich & WESTON 10, under which Yugoslavia paid a lump sum of \$17,000,000 "in full settlement and discharge of all pecuniary claims of the Government of the United States, other than those arising from Lend-Lease and civilian supplies furnished as military relief, . . . and in full settlement of all claims of nationals of the United States," to include purely governmental claims. FCSC 22: "The Commission granted an award to the United States of America for the loss of a jeep and two aircraft. . . ."

<sup>96</sup> Approximately one-third of the payments eventually received by the United States presumably will be earmarked, in turn, to compensate the four crewmen or their heirs and legatees. See text accompanying notes 93 *supra* & 97 *infra*. Since the legislation implementing the agreement makes no provision for the determination of their aliquot share, see text accompanying note 98 *infra*, this allocation apparently will be made by the Department of State pursuant to its discretionary powers. See text accompanying note 44 *supra*.

<sup>97</sup> "With reference to Article 2, paragraph 4 of the Agreement regarding claims of today's date, the Government of the United States will earmark, out of the amount of the lump sum paid, \$125,000 for the settlement of the 1951 aerial incident."

<sup>98</sup> The legislation implementing the agreement authorizes and directs the Secretary of the Treasury:

to deduct the sum of \$125,000 from the Hungarian Claims Fund and cover such amount into the Treasury to the credit of miscellaneous receipts in satisfaction of the claim of the United States referred to in article 2, paragraph 4 of the United States-Hungarian Claims Agreement of March 6, 1973. Such amount shall be deducted in annual installments over the period during which the Government of Hungary makes payments to the Government of the United States as provided in article 4 of the agreement.

See note 1 *supra*.



ing the amount of compensation available for distribution to ordinary private claimants.<sup>99</sup>

### III.

#### THE ELIGIBILITY PROVISIONS OF THE AGREEMENT

Whereas the Rumanian and Bulgarian lump sum agreements settle only claims of "nationals of the United States,"<sup>100</sup> the Hungarian Agreement, in view of the aerial incident claims, also covers claims of "the Government of the United States."<sup>101</sup> While this variation on the provisions of Title III and the two prior agreements is understandable, other discrepancies appearing in the present agreement are more difficult to explain. They occur mainly in two interrelated areas.

*Continuous Nationality.* Customary international law maintains "that a claim be continuously owned from the date the claim arose, and at least to the date of presentation, by nationals of the state asserting the claim."<sup>102</sup> This rule was not spelled out in Title III, with the result that the FCSC required U.S. nationality to commence at a different time for each class of claims: the date of the armistice for Peace Treaty claims;<sup>103</sup> the date of loss for nationalization claims;<sup>104</sup> and the date certain obligations were acquired for financial debt claims.<sup>105</sup> Although both the Rumanian and Bulgarian lump sum agreements contained provisions adopting the FCSC's approach across the board,<sup>106</sup> for some unexplained reason the drafters of the Hungarian Agreement saw fit to omit this boilerplate clause concerning the commencement of nationality. Presumably this oversight can be regarded as harmless error.<sup>107</sup>

At opposite ends from the commencement of nationality problem is the problem of the length of time that nationality must be held. The FCSC,

<sup>99</sup> Although it is far from clear from the legislation implementing the agreement, *see* text accompanying note 98 *supra*, the Department of State takes the position that the United States will not receive the full \$125,000, but only "an installment payment on a par with other awardees. . . ." *House Hearing 3* (statement of Fabian A. Kwiatek, Assistant Legal Adviser, Department of State). If the United States does receive only a pro rata share of the \$125,000, the reduction in the amount of compensation available for ordinary distribution will be minimized accordingly.

<sup>100</sup> *See* note 46 *supra*.

<sup>101</sup> Art. 2. *See* text at notes 93-99 *supra*.

<sup>102</sup> 8 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 1241 (1967).

<sup>103</sup> FCSC 159. In the case of Hungary, January 20, 1945.

<sup>104</sup> FCSC, *TENTH SEMIANN. REP.* 44 (1959).

<sup>105</sup> FCSC 170. In the case of Hungary, prior to September 1, 1939.

<sup>106</sup> Arts. 1(2)(a)-(c) of the Rumanian and Bulgarian lump sum agreement. *See* Lillich 698-99.

<sup>107</sup> The Department of State apparently assumes that the Hungarian Agreement incorporates the FCSC's approach *sub silentio*. Thus, in response to the question of whether persons who had fled Hungary during the 1956 revolt would benefit from the provision authorizing new nationalization claims, the Department's representative replied that "[i]f they were U.S. nationals as of the time their property was taken, they will." *House Hearing 8* (statement of Fabian A. Kwiatek, Assistant Legal Adviser, Department of State).

again lacking guidance under Title III, adopted a uniform approach here by requiring continuous nationality of all three types of claims until the date of filing with the Commission.<sup>108</sup> While the Rumanian Agreement was silent on this score, its Bulgarian successor liberalized the FCSC's approach slightly by requiring continuous nationality only until the date of filing with "the Government,"<sup>109</sup> thereby possibly rendering compensable some claims that the Commission had denied under Title III.<sup>110</sup> The Hungarian Agreement, reverting to the approach of its Rumanian predecessor, omits any provision as to the duration of nationality. Presumably, as in the case of its commencement, the agreement incorporates sub silentio the FCSC's approach under Title III.<sup>111</sup> Since nothing is gained by failing to handle these problems in forthright fashion in the agreement, one only can speculate about why a continuous nationality clause was overlooked or ignored.

*Compensable Ownership Interests.* Title III authorized claims by individuals who were U.S. nationals, corporations organized in the United States which were 50 percent owned by such individuals, and stockholders (either individuals or corporations) when the injured or nationalized corporation was 25 percent so owned. An amendment later made the 25 percent test inapplicable to claims based upon direct stock ownership in nationalized corporations.<sup>112</sup> Article 2 of the Rumanian Agreement attempted to copy these statutory standards faithfully,<sup>113</sup> but, while its paragraphs (a) and (b) specifying the eligibility requirements for individual and corporate claims caused no problems, its paragraph (c) covering stockholder claims was a different matter.<sup>114</sup> In an attempt to avoid such difficulties, the drafters of the Bulgarian Agreement simply omitted the traditional article defining just what ownership interests were compensable. This rather startling lacuna, in its own turn, produced a host of questions concerning not only stockholder claims, but corporate claims as well.<sup>115</sup>

<sup>108</sup> FCSC 159.

<sup>109</sup> Arts. 1(2)(a)-(c) of the Bulgarian lump sum agreement.

<sup>110</sup> For a brief discussion of this possibility, which also may have relevance under future lump sum agreements, see Lillich 700.

<sup>111</sup> See text accompanying note 107 *supra*. The hearings on the legislation implementing the agreement are silent on this point.

<sup>112</sup> See text at note 28 *supra*.

<sup>113</sup> Article 2 provided for the settlement of certain claims:

(a) directly owned by individuals who were nationals of the United States of America (for this purpose ownership through a partnership or an unincorporated association being considered direct ownership);

(b) directly owned by a corporation or other legal entity organized under the laws of the United States of America or a constituent state or other political entity thereof, if more than fifty per centum of the outstanding capital stock or other beneficial interest in such legal entity was owned directly or indirectly by natural persons who were nationals of the United States of America; or

(c) indirectly owned by individuals or corporations within subparagraphs (a) or (b) of this Article through interests, totalling twenty-five per centum or more, in a Rumanian legal entity.

<sup>114</sup> For a detailed critique of this paragraph, see Lillich 701-03.

<sup>115</sup> "[M]ust the United States corporate claimant be 50 percent American-owned as Title III specified, 20 percent American-owned as the Yugoslav Agreement required, or merely incorporated in the United States as the Treaty of Peace provided?" *Id.* at 703-04.

Article 3(1) of the Hungarian Agreement comes home, at least in part, to the definitions found in Title III and restated in Article 2 of the Rumanian Agreement. Thus subparagraph (a) defines a U.S. national as "a natural person who is a citizen of the United States, or who owes permanent allegiance to the United States,"<sup>116</sup> while subparagraph (b) extends the term to cover "a corporation or other legal entity which is organized under the laws of the United States, any State or Territory thereof, or the District of Columbia, if natural persons who are nationals of the United States own, directly or indirectly, more than 50 per centum of the outstanding capital stock or other beneficial interest in such legal entity."<sup>117</sup> These provisions satisfactorily cover individual and corporate claims, in the latter case eliminating some of the confusion under the Bulgarian Agreement,<sup>118</sup> but they give no guidance at all about stockholder claims. Apparently the Department of State, still sensitive to the drafting difficulties it had encountered in the Rumanian Agreement, thought discretion the better part of valor.

In any event, all the questions raised by the Bulgarian Agreement's failure to mention stockholder claims can be asked again in connection with the lacuna in the present agreement.<sup>119</sup> While the Department of State presumably intended to follow Title III, once more nothing seems to have been gained by deliberately leaving the matter in doubt. Congress having prescribed guidelines for the determination of stockholder claims quite consistent with customary international law norms,<sup>120</sup> and the FCSC having applied these guidelines without especial difficulties, sufficient justification for refusing to clarify the all-important issue of their eligibility appears wanting. Indeed, in view of the anachronistic attitude toward such claims displayed by the International Court of Justice in the *Barcelona Traction* case,<sup>121</sup> one would have thought that the Department of State would have insisted upon the inclusion of a specific provision on stockholder claims

<sup>116</sup> Compare Art. 2(a) of the Rumanian Agreement in the text accompanying note 113 *supra*.

<sup>117</sup> Compare Art. 2(b) of the Rumanian Agreement in the text accompanying note 113 *supra*.

<sup>118</sup> See text at and accompanying note 115 *supra*.

<sup>119</sup> See Lillich 703:

It is far from certain . . . what rules the Department envisaged would govern the distribution. Should all stockholder claims be allowed without regard to American ownership interest, as the Treaty of Peace provided? Should indirect stockholder claims be subjected to a 25 percent requirement? Should all stockholder claims except direct claims in nationalized corporations, as was the case under the amended statute, fall within the 25 percent rule? Or should all stockholder claims be so handled, as the original statute stated? Presumably the penultimate alternative is to control, although claimants, attorneys and students of international law would welcome a clearer manifestation of this intent.

<sup>120</sup> For extensive discussion of the customary international law norms governing stockholder claims, see 1 LILlich & WESTON ch. II, Part D.

<sup>121</sup> *Barcelona Traction, Light & Power Co., Ltd. Case*, [1970] ICJ 3. For a critique of the Court's approach to the determination of the customary international law norms governing stockholder claims, see Lillich, *The Rigidity of Barcelona*, 65 AJIL 522 (1971).

in the Hungarian Agreement just to demonstrate that such claims are regarded as compensable in the post-*Barcelona* period.<sup>122</sup>

#### IV.

##### AN EVALUATION OF THE AGREEMENT

As stated in the Introduction, the Hungarian Agreement warrants examination not only in itself, but also for what it shows about the technique of preadjudication used by the United States and, indeed, the international claims settlement process generally. To put the critique of the present agreement in better perspective, therefore, it may be helpful to compare it first with the other lump sum agreements negotiated with Hungary since World War II.

In addition to its lump sum agreement with the United States, Hungary has concluded seventeen such settlements with the following countries: Austria (thrice),<sup>123</sup> Belgium/Luxembourg,<sup>124</sup> Canada,<sup>125</sup> Denmark,<sup>126</sup> France (twice),<sup>127</sup> Great Britain,<sup>128</sup> Greece,<sup>129</sup> The Netherlands,<sup>130</sup> Norway,<sup>131</sup> Sweden (twice),<sup>132</sup> Switzerland,<sup>133</sup> the USSR<sup>134</sup> and Yugoslavia.<sup>135</sup> With the

<sup>122</sup> Other claimant states have insisted on such specific provisions. See, e.g., Art. 2 of the Belgian/Luxembourg-Rumanian Agreement, Nov. 13, 1970, 1 LILlich & WESTON app. B.

<sup>123</sup> The three lump sum agreements constituted a package settlement. Under the Austrian-Hungarian Agreement, Oct. 31, 1964, [1967] BGBl. 1673, 605 UNTS 3, 2 LILlich & WESTON 302, Hungary agreed to pay Austria 65 million Austrian schillings within 30 days and another 22.5 million Austrian schillings within two years. The 65 million, however, came from lump sums of 40 million Austrian schillings and 25 million Austrian schillings which Austria agreed to pay Hungary within 30 days under the Hungarian-Austrian Agreement, Oct. 31, 1964, [1967] BGBl. 1694, 605 UNTS 63, 2 LILlich & WESTON 305, and the Hungarian-Austrian Agreement, Oct. 31, 1964, [1967] BGBl. 1696, 605 UNTS 77, 2 LILlich & WESTON 306, respectively.

<sup>124</sup> Belgian/Luxembourg-Hungarian Agreement, Feb. 1, 1955, [1955] Monit. 6373 (Oct. 7), 2 LILlich & WESTON 109.

<sup>125</sup> See note 49 *supra*.

<sup>126</sup> Danish-Hungarian Agreement, June 18, 1965, [1965] Lovtidende C 1034, 2 LILlich & WESTON 312.

<sup>127</sup> See note 63 *supra*.

<sup>128</sup> British-Hungarian Agreement, June 27, 1956, [1956] Gr. Brit. T.S. No. 30 (Cmd. 9820), 249 UNTS 19, 2 LILlich & WESTON 131.

<sup>129</sup> Greek-Hungarian Agreement, April 27, 1963, 550 UNTS 197, 2 LILlich & WESTON 260.

<sup>130</sup> See note 49 *supra*.

<sup>131</sup> See note 49 *supra*.

<sup>132</sup> See note 63 *supra*.

<sup>133</sup> Swiss-Hungarian Agreement, July 19, 1950, [1950] ROLF 736, [1950] AS 712, 2 LILlich & WESTON 49.

<sup>134</sup> Hungarian-Soviet Agreement, March 14, 1958, 20 USSR Ministry of Foreign Affairs Collection of Treaties, Agreements, and Conventions in Force 412 (1961), 2 LILlich & WESTON 161.

<sup>135</sup> Yugoslav-Hungarian Agreement, May 29, 1956, [1957] Medjunarodni ugovori FNRJ. Sveska br. 73, str. 22, [1957] Dodatak Službenog lista FNRJ br. 10, str. 22, 2 LILlich & WESTON 130.

exception of the latter, under Article 2 of which Hungary agreed to pay its Communist neighbor \$85,000,000 worth of merchandise over a five-year period, the agreements involved relatively modest amounts, payable over periods of not more than five years.<sup>136</sup> Nevertheless, the total amount involved undoubtedly exceeded \$125,000,000,<sup>137</sup> all of which, save for two installments of \$220,000 due Canada,<sup>138</sup> had been paid prior to the conclusion of the present agreement. Given these facts, it is difficult to believe that Hungary should not have been asked, and if asked could not have afforded, to pay more than \$18,900,000 over a 20-year period in settlement of claims worth at least \$80,296,047.<sup>139</sup> Surely, in view of the extraordinary delay in reaching the present agreement<sup>140</sup> and the many *quid pro quos* granted Hungary under it,<sup>141</sup> the United States should have received no less favorable treatment than that accorded Yugoslavia.

An examination of the other lump sum agreements concluded by Hungary also reveals that, in addition to nationalization and war damage claims, it has settled a wide array of creditor claims not covered by the present agreement, most notably claims based upon debts owed by nationalized corporations. Several lump sum agreements specifically sanction such claims,<sup>142</sup> while many other settlements contain broad language obviously embracing them.<sup>143</sup> Even broader language covering all types of creditor claims may be found in a few agreements,<sup>144</sup> with the ambit of claims covered under other settlements so broad as to be almost all inclusive.<sup>145</sup> Finally, a large number of lump sum agreements contain provisions settling

<sup>136</sup> The only exceptions were Article 6 of the Swiss-Hungarian Agreement, *supra* note 133, providing for payments over 10 years, and Article 2 of the British-Hungarian Agreement, *supra* note 128, under which payments, keyed to exports from Hungary to Great Britain, took 15 years to complete. FCC, TWENTY-FIRST REPORT, CMND. No. 4787, at 3 (1971).

<sup>137</sup> Converting the various currencies of payment into U.S. dollars, using the rate of exchange prevailing on the date of signing of the lump sum agreements obtained from WORLD CURRENCY CHARTS (5th ed. 1970), it appears that Hungary agreed to pay a grand total of \$109,206,562, to which must be added the value of the claims it waived under several of the settlements. See, e.g., Art. 2 of the Hungarian-Soviet Agreement, note 134 *supra*. Thus the figure of \$125,000,000, while a guess, is an educated one.

<sup>138</sup> See Art. 2 of the Canadian-Hungarian Agreement, note 49 *supra*.

<sup>139</sup> See text at note 32 *supra*. Moreover, if interest from August 9, 1955 to March 6, 1973 were added to the preadjudicated nationalization and financial debt claims, their value would be considerably higher than the figure given in the text.

<sup>140</sup> France, it will be recalled, negotiated its first lump sum agreement with Hungary in 1950. See note 63 *supra*. The median date of the seventeen lump sum agreements previously concluded with Hungary is 1963.

<sup>141</sup> See text at notes 166–70 *infra*.

<sup>142</sup> Art. 1(1) of the Swiss-Hungarian Agreement, note 133 *supra*; Art. 1(1) of the Swedish-Hungarian Agreement of 1951, note 63 *supra*; Art. 2(c) of the Belgian/Luxembourg-Hungarian Agreement, note 124 *supra*; and Art. 1(1) of the Danish-Hungarian Agreement, note 126 *supra*.

<sup>143</sup> See, e.g., Art. 1(1)(a) of the Dutch-Hungarian Agreement, note 49 *supra*.

<sup>144</sup> See, e.g., Art. 1(1)(b) of the Greek-Hungarian Agreement, *supra* note 129, which settles claims by "any Greek creditor. . . ."

<sup>145</sup> See, e.g., Art. 1(1)(a) of the British-Hungarian Agreement, note 128 *supra*.

one or more specific class of creditor claim, such as bank balances,<sup>146</sup> bonds,<sup>147</sup> debts incorporated into securities,<sup>148</sup> debts *not* incorporated into securities,<sup>149</sup> debts arising out of contracts of insurance,<sup>150</sup> debts arising from short-term credits and treasury bills,<sup>151</sup> and miscellaneous private debts.<sup>152</sup> In short, these lump sum agreements, reflecting present trends in state practice,<sup>153</sup> render compensable a host of creditor claims not covered by the Hungarian Agreement. By not pressing for the inclusion of such claims in the present agreement, the Department of State may have achieved an inflated percentage return figure to brandish at critics of its negotiating record,<sup>154</sup> but only at the cost of depriving many claimants of any recovery at all under the settlement.<sup>155</sup>

Hungary's record with respect to the settlement of claims brought by other countries, especially its repeated willingness to settle many of their creditor claims, must be kept in mind when evaluating the present agreement. The Department of State, which claims that "the settlement represents 40 percent of the total amount of the claims advanced,"<sup>156</sup> contends that it "is in line with the *minimum* percentage in claims settlement agreements concluded with other Eastern European communist countries to date."<sup>157</sup> If one places special stress on the adjective "minimum," the above statement is no doubt accurate, since the Rumanian and Polish lump sum agreements provided compensation for only 33.4 percent and 39.7 percent of awards respectively.<sup>158</sup> Settlements with Bulgaria and Yugoslavia, on the other hand, produced 55.8 percent and 90.3 percent returns,<sup>159</sup> so the minimal character of the achievement under the present agreement needs underscoring.

Looking elsewhere for support, the Department of State also contends that a 40 percent return "compares favorably with, and is well above, the reported percentages in claims settlement agreements concluded by the Hungarian People's Republic with other countries, with some providing for as low as 7½ percent and 10 percent of the amounts of the claims as-

<sup>146</sup> See, e.g., Art. 1(1)(a)(ii) of *id.*

<sup>147</sup> See, e.g., Art. 1(1)(b) of the Austrian-Hungarian Agreement, note 123 *supra*.

<sup>148</sup> See, e.g., Art. 1(2)(a) of the Swedish-Hungarian Agreement of 1951, note 63 *supra*.

<sup>149</sup> See, e.g., Art. 1(2)(b) of *id.*

<sup>150</sup> See, e.g., Art. 1(2) of the Canadian-Hungarian Agreement, note 49 *supra*.

<sup>151</sup> See, e.g., Art. 1(2) of the British-Hungarian Agreement, note 128 *supra*.

<sup>152</sup> See note 143 *supra*.

<sup>153</sup> See text at and accompanying notes 67-68 *supra*.

<sup>154</sup> But see text at notes 164-65 *infra*.

<sup>155</sup> Certain creditor claimants, of course, eventually may receive some compensation under the private settlements contemplated by Annexes D and E. See text at notes 70-71 & 82-87 *supra*.

<sup>156</sup> *Senate Hearing* 29 (letter from Marshall Wright, Acting Assistant Secretary for Congressional Relations, to Senator Fulbright).

<sup>157</sup> *Id.* at 30 (emphasis added).

<sup>158</sup> Freidberg & Lockwood, *supra* note 35, at 130.

<sup>159</sup> *Id.*

serted, and with none exceeding 25 percent.”<sup>160</sup> Admittedly, data in this area is sometimes difficult to locate, but readily available figures flatly contradict the latter half of the above assertion: under their lump sum agreements Great Britain, The Netherlands, and France achieved 25.4 percent,<sup>161</sup> 52.1 percent,<sup>162</sup> and 87 percent<sup>163</sup> returns respectively. Moreover, their settlements occurred years before the present agreement (1956, 1965, and 1950 respectively), with the installments due thereunder long since having been paid (1971, 1967, and 1954 respectively), thus making the compensation received by their claimants far more valuable. Indeed, even disregarding the fact that the estimated 40 percent return has been achieved only by the exclusion of many creditor claims which were included within the above lump sum agreements,<sup>164</sup> the actual value of what claimants ultimately will receive under the Hungarian Agreement, taking into account the 28-year delay in settlement and the 20 years allowed to complete payment, is just 4.5 percent of their adjudicated awards.<sup>165</sup>

<sup>160</sup> See note 157 *supra*.

<sup>161</sup> See the FCC report cited in note 136 *supra*.

<sup>162</sup> This percentage is based upon composite figures taken from van Wees, *Compensation for Dutch Property Nationalized in East European Countries*, 3 NETH. Y.B. INT'L L. 62, 88 (1972).

<sup>163</sup> See B. WESTON, INTERNATIONAL CLAIMS: POSTWAR FRENCH PRACTICE 179 n.444 (1971), who also quotes informed sources as stating that the actual percentage paid was “much lower” than this figure.

<sup>164</sup> See text at notes 142–55 *supra*. The return also may have been achieved by using other funds to “top up” awards to Peace Treaty claimants, thus freeing funds to compensate other claimants, a fact insufficiently explored during hearings on the legislation implementing the present agreement.

Provisions in the above legislation revamping the award payment structure found in Title III, aimed at assuring that new claimants will not obtain an advantage over old ones, specify that “new awardees will initially be limited to the percentage paid to the old awardees and then permit the residual balance to be distributed proportionately among all eligible awardees.” *Senate Hearing 3* (statement of Wayland D. McClellan, General Counsel, FCSC). Furthermore, they specifically prohibit

any further payment to be made on war damage awards made under [Title III] until all other awards have been paid in equal proportions to such awards. *The war damage awards have been paid in amounts of up to 40 percent out of another fund, the War Claims Fund*, under the provisions of Public Law 87-846, approved October 22, 1962 [Title II of the War Claims Act of 1948, as amended].

*Id.* (emphasis added). *Accord, House Hearing 3*, 6 (statements of Fabian A. Kwiatek, Assistant Legal Adviser, Department of State, and J. Raymond Bell, Chairman, FCSC). See note 1 *supra*.

In revamping the award payment structure, Congress ignored the suggestion of Members of the Bar that individual claimants be given priority over corporate claimants, despite the fact that a single corporate claim “absorbs almost one-half of the entire Hungarian Claims fund. . . .” *House Hearing 22* (letter from Messrs. Regosin, Edwards, & Freeman to Representative Rosenthal). Compare Congress’s receptivity to the special interest amendment of a former Senator discussed in the text accompanying note 64 *supra*.

<sup>165</sup> Assuming that \$22,218,614 will be available for distribution to claimants holding awards the principal of which amounts to \$58,181,408, and that after a delay of 28 years it now will take another 19 years to complete payment, the 4.5 percent figure is

This low recovery is even more surprising when one considers the numerous quid pro quos granted Hungary under the present agreement, all coming on top of the many economic benefits extended to it in the immediate postwar period.<sup>166</sup> In the first place, under Article 8 the United States agrees to release its blocking controls over all Hungarian accounts, now estimated to amount to approximately \$1,000,000.<sup>167</sup> Secondly, under Article 4(2), a carrot-and-stick provision, the United States impliedly agrees to facilitate Hungarian exports to the United States, since if six percent of the dollar proceeds of such exports shall exceed \$945,000 in any year

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arrived at as follows (using a formula from the standard work C. GRIFFIN, T. WILLIAMS & G. WELSCH, *ADVANCED ACCOUNTING* 783-84 [1966]):

#### Terms

PV = present value.

P = the amount of each installment ( $\frac{\$22,218,614}{20}$  or \$1,110,930.70, assuming equal payments each year).

i = the market interest rate (6 percent).

n<sub>1</sub> = the number of years over which payments are to be made (20).

n<sub>2</sub> = the number of years of delay in payment of the first installment (28).

#### Formula

$$PV = \frac{P[1 - (1 + i)^{-n_1}][1 + i]^{-(n_2-1)}}{i}$$

#### Calculation

$$\begin{aligned} PV &= \frac{\$1,110,930.70[1 - (1 + 0.06)^{-20}][1 + 0.06]^{-27}}{0.06} \\ &= \$2,642,342.08 \text{ (to be compared with } \$58,181,408). \end{aligned}$$

Thus the actual value to claimants of the compensation to be paid under the Hungarian Agreement, that is, the value in 1945 of a guarantee that they would receive the compensation provided for in the agreement in installments from 1973-1992, is 4.5 percent of the amount of their adjudicated awards.

*Nota bene:* The above calculation does *not* take into account the ravages of inflation, which would reduce still further—to less than 2 percent—the actual value of the compensation.

The writer wishes to express his appreciation to his friend and colleague in many joint ventures, Professor Norman N. Mintz of the Department of Economics at Columbia University, for his valuable assistance in the preparation of this footnote and for his wise counsel about approaching the compensation question generally.

<sup>166</sup> In addition to economic assistance of various sorts, the United States on August 6, 1946 returned gold reserves of the Hungarian National Bank worth an estimated \$32,000,000. [1946] 6 FOREIGN REL. U.S. 296, 310, 329 (1969). See 15 DEPT. STATE BULL. 335 (1946). The following year it returned 127 tons of silver. [1947] 4 FOREIGN REL. U.S. 293 (1972). The premature release of these assets proved costly indeed.

The United States learned its lesson, however, for in 1948 it conditioned the release of Yugoslav gold reserves upon the negotiation of the Agreement with Yugoslavia of 1948, *supra* note 95, under which \$17,000,000 of gold reserves amounting to nearly \$47,000,000 was earmarked to compensate claimants in more adequate fashion. Currently the United States is holding a substantial amount of Czech gold pending a satisfactory settlement with that country. See note 9 *supra*.

<sup>167</sup> See text at and accompanying note 42 *supra*.



the excess amount shall be credited towards payments in acceleration of the scheduled annual installments.<sup>168</sup> Thirdly, in Annex F the United States agrees to seek authority from Congress to extend most-favored-nation treatment to Hungary, a commitment which if not fulfilled apparently allows Hungary to suspend its annual installments.<sup>169</sup> Finally, the United States agrees, upon full payment of the annual installments, to waive all claims against Hungary for which compensation is provided under the agreement, whether or not they have been brought to Hungary's attention.<sup>170</sup>

The low recovery, moreover, constitutes yet another nail in the coffin of the just compensation standard which the United States still purports to support.<sup>171</sup> Over a decade ago the present writer observed that, "[i]f the United States continues to accede to settlements whereby its claimants receive less than one-third compensation for their adjudicated losses, it

<sup>168</sup> Article 4(3) provides, *inter alia*, that "the f.o.b. value in dollar imports into the United States from Hungary shall be taken from the official publications of the United States Department of Commerce (that is, FT 990, U.S. Foreign Trade, Highlights of Exports and Imports, or its successor publications.)" During 1973 Hungarian exports to the United States were sufficient to produce a second installment of \$984,000 under this formula. See text at and accompanying note 40 *supra*.

For a similar provision keying the amount of installment payments to Hungarian exports, see Article 2 of the British-Hungarian Agreement, note 128 *supra*. Under this provision, which unlike Article 4(2) of the present agreement contained no acceleration clause, Hungary took 15 years to complete payment. See note 136 *supra*.

<sup>169</sup> See note 43 *supra*. In the Exchange of Notes comprising Annex F, Hungary states in reply that "[i]f it is not possible for the two governments to extend reciprocally most-favored-nation treatment on mutually agreeable terms within a reasonable amount of time, the Government of the Hungarian People's Republic reserves the right to consult with a view toward considering the continuation of payments provided for by Article 4 of the Agreement regarding claims of today's date." By "a reasonable amount of time" apparently is meant two years. *Senate Hearing 6* (statement of Thomas S. Huang, Acting Assistant Legal Adviser, Department of State). *Nota bene* the Department of State's acknowledgment that, if Congress has not granted most-favored-nation treatment to Hungary by such time, "it is possible that the Government of the People's Republic of Hungary, based on its contention that it must be able to earn foreign exchange in order to pay in foreign exchange, might wish to suspend future payments until FMN [*sic*] treatment is granted." *Id.* at 31 (letter from Marshall Wright, Acting Assistant Secretary for Congressional Relations, to Senator Fulbright). See text at and accompanying note 178 *infra*.

<sup>170</sup> See note 41 *supra*. Conversely, Hungary waives three classes of claims against the United States, declaring that the lump sum has been reached by taking them into account. Art. 6(2). This provision prompted one Hungarian claimant to inquire: "Is it possible that funds to pay *our* claims are being used to pay off a counterclaim that is directed against *all* the people of the United States?" *House Hearing 23* (letter from Andre Bodor to Representative Rosenthal). The FCSC replied that it was "unable to comment on the mechanics utilized by the Department of State in reaching the \$18.9 million settlement. Any comment on this issue should come from the Legal Adviser, Department of State." *Id.* at 24 (letter from J. Raymond Bell, Chairman, FCSC, to Representative Rosenthal). None was forthcoming. On the waiver of private claims as part of a package deal to obtain various benefits for the entire body politic, see text at and accompanying note 179 *infra*.

<sup>171</sup> See, e.g., Enders, *Action Program for World Investment*, 71 DEPT. STATE BULL. 477, 481 (1974): "[W]e must insist on prompt, adequate and effective compensation in the few cases of nationalization."

should not be surprised if during the course of future negotiations foreign countries raise the doctrine of estoppel to its arguments for just and adequate compensation."<sup>172</sup> Apparently this eventuality finally arrived during the course of the Hungarian negotiations,<sup>173</sup> since the history of the legislation implementing the agreement reveals that "[a] negotiating goal of forty percent (typical of that reached in agreements with other Eastern European countries) was applied. . . ." <sup>174</sup> That formally acknowledging such a "rule of thumb"<sup>175</sup> bodes ill for future settlements is shown by Czechoslovakia's recent assertion that, applying quasi-most-favored-nation treatment, it should not have to compensate United States claimants to a greater extent than did Hungary.<sup>176</sup>

An evaluation of the Hungarian Agreement, however, must take into account a vast number of factors in addition to the amount of compensation obtained for claimants. "The only meaningful assessment of a lump-sum agreement," Christenson has remarked,

is pragmatic: In defining the limits of the immediate goals sought, will the advantages in settlement outweigh the disadvantages? The advantages may be private, as providing some compensation to claimants, or public, as removing barriers to favorable trade agreements. The disadvantages may also be private, as settling claims for less than their full value, or public, as releasing a Communist country from its responsibility to compensate American claimants adequately upon partial compensation or giving a clean bill of health before the international community.<sup>177</sup>

Applying this pragmatic approach to the Hungarian Agreement, the private factors appear evenly balanced. So do the public factors, although the advantages of increased trade—a significant aspect of the policy of detente—obviously carried the day with U.S. decisionmakers.<sup>178</sup> One may debate the wisdom of their decision: only time will tell. What seems less debatable, however, is that private claimants, both under the present agreement and in the future, are being asked to pay full freight for political benefits accruing to the entire body politic and economic benefits accruing

<sup>172</sup> R. LILICH, *supra* note 6, at 105-06.

<sup>173</sup> It had been foreseen. Lillich 705.

<sup>174</sup> H.R. REP. NO. 93-1027, 93d Cong., 2d Sess. 2 (1974).

<sup>175</sup> *Senate Hearing 7* (statement of Wayland D. McClellan, General Counsel, FCSC).

<sup>176</sup> Letter from Ambassador Spacil to the Washington Post, Feb. 14, 1975, at A31, at cols. 4, 5, & 6. Presumably Cuba will demand such treatment too, as well it might in view of the above and the fact that, when asked recently about the settlement of U.S. claims against Cuba, "[a] State Department official said that negotiations with foreign governments usually conclude with U.S. claimants receiving about 40 per cent of their demands." *Int'l Herald-Tribune*, April 1, 1975, at 3, col. 2. Lawyers with any experience negotiating settlements in domestic disputes can only shake their heads upon reading such self-defeating (and self-fulfilling) prophecies!

<sup>177</sup> Christenson 634-35.

<sup>178</sup> See Pedersen, *Restoring Europe's Sense of Unity*, 69 DEPT. STATE BULL. 16, 20 (1973): "In a country with a relatively liberalized system such as Hungary, for example, the 100 percent higher tariffs our exporters face over those from western Europe is [*sic*] a real obstacle which reciprocal extension of MFN would overcome."

primarily to a small segment of the business community. The equitableness of this arrangement is open to serious question.<sup>179</sup>

Finally, admitting the considerable practical advantages of the technique of preadjudication,<sup>180</sup> one may ask whether it actually contributed much to the conclusion of the present agreement. The answer probably is a qualified yes. Having adjudicated awards in hand, awards which fixed a much lower value on the claims than the amounts originally asserted by the claimants,<sup>181</sup> could not but have strengthened the case for the United States. On the other hand, as Martin has noted, "the size of a compensation fund obtainable from an expropriating Government is determined neither exclusively nor predominantly by the particulars which can be presented of the claims put forward."<sup>182</sup> Rather, the size is affected by a variety of factors, not the least of which are "the crass facts of relative bargaining power."<sup>183</sup> Of the many factors present here, surely the lure of increased trade and the other advantages extended to Hungary counted for more when it came to settlement than did the actual preadjudication of the claims.

Preadjudication, despite the many technical problems it creates for United States negotiators—not all of which were solved satisfactorily in the case of the present agreement<sup>184</sup>—thus remains a very useful but necessarily limited device in the international claims settlement process. With its utility recently reaffirmed by the decision of the United States to register claims against East Germany,<sup>185</sup> and with other post-preadjudication lump sum agreements in the offing,<sup>186</sup> what is needed now more than ever is a full-scale examination of this increasingly complex technique for the settlement of international claims, a technique which not only has supplanted resort to international claims commissions, but also appears to be gradually replacing the traditional espousal process. As part of this examination, the Hungarian Agreement makes an excellent case study.

<sup>179</sup> Former Senator Keating once called lump sum agreements "a form of foreign aid at the expense of [certain] U.S. taxpayers." 109 CONG. REC. 25149 (1963). For the suggestion that the burden might be spread over all taxpayers and not limited to private claimants, see R. LILICH, *supra* note 5, at 194-205 *passim*. It is worth noting that the Department of State's new Legal Adviser once expressed similar views. Leigh & Atkeson, *Due Process in the Emerging Foreign Relations Law of the United States—Part I*, 21 BUS. LAWYER 853, 870-77 (1966).

<sup>180</sup> See R. LILICH, *supra* note 5, at 187-88.

<sup>181</sup> See text accompanying note 15 *supra*.

<sup>182</sup> Martin, *The Distribution of Funds Under the Foreign Compensation Act, 1950*, in 44 TRANSACT. GROT. SOC'Y 243, 249-50 (1959).

<sup>183</sup> S. RUBIN, PRIVATE FOREIGN INVESTMENT 98 (1956).

<sup>184</sup> See text at notes 56-61, 88-92, 106-07, 111 & 118-20 *supra*.

<sup>185</sup> Int'l Herald-Tribune, Feb. 13, 1975, at 3, cols. 5-6.

<sup>186</sup> See text at and accompanying note 176 *supra*.

# MINERAL AGREEMENTS IN DEVELOPING COUNTRIES: STRUCTURES AND SUBSTANCE

*By David N. Smith \* and Louis T. Wells, Jr.\*\**

## PROLOGUE

Despite the many dramatic developments that have occurred over the past half dozen years in relation to the production of natural resources in some areas of the third world, mineral production in most developing countries is still carried out through contractual arrangements between foreign firms and host country governments. The nationalization of the copper industry in Chile and the bauxite industry in Guyana, the spectacular successes of OPEC, and the completed or projected nationalizations of petroleum operations in a number of countries have taken center stage since 1969. Nevertheless, these developments are not typical of the vast majority of mineral arrangements in developing countries.

Most mineral contracts negotiated in recent years do, however, differ significantly from those of a decade or so earlier. In fact, many of those earlier agreements have been revised to reflect the standards of the more recent agreements. The hands of the developing countries have been strengthened in some instances through improved access to information from other producing countries as well as through the assistance of international organizations.

Changes in the structures of various industries as well as increased host country awareness of issues relating to sovereignty have affected various relationships. But improvements have been uneven. Contractual arrangements between developing countries and foreign companies reflect this fact. The way in which an individual agreement is shaped is influenced by relative bargaining strength (which itself is shaped by several factors, including the structure of the particular industry and the firm's role in that industry); the host country's concern with issues of sovereignty and control; and the information and negotiating skills which each party brings to the bargaining table. These factors influence both the form and the substance of the agreements.

Recent changes have generated a number of innovations in the structure of agreements. The principal purpose of this article is to explore some of these innovations and to suggest their relationship to the various substantive goals of the parties.

Analyses of the forms and substance of concession agreements, particularly outside the oil industry, have been rare. This fact is, no doubt, largely a result of the difficulty that any potential analyst has faced in

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gaining access to contracts. A number of scholars who wrote about concession-related problems in the 1940's, 1950's, and 1960's felt obliged to issue apologies for never having seen more than a handful of, usually dated, concession agreements.<sup>1</sup> Even now, significant collections of agreements are generally found only in the files of individuals who have served as consultants to developing countries.

## INTRODUCTION

Arrangements between foreign investors and host countries for the development of natural resources have carried many names: "concession agreement," "economic development agreement," "service contract," "work contract," "joint venture contract," "production-sharing agreement," and, most recently, "participation agreement." Occasionally, within particular countries, the distinctions in terminology are significant in differentiating various forms of arrangements.<sup>2</sup> In other instances, varying terminologies relate to agreements of essentially the same nature.<sup>3</sup> In still other cases, the same terminology has been utilized in one country for agreements which are, in substance, quite different from each other.<sup>4</sup>

In many cases, the choices of terminology and form reflect political considerations. A developing country may find more acceptable over the long run an agreement characterized as a "work contract" which provides, as the Indonesian Kennecott Copper work contract did, that

All mineral resources contained in the territories of the Republic of Indonesia . . . are the national wealth of the Indonesian nation (and

<sup>1</sup> See, for example, Hyde, *Economic Development Agreements*, 105 REC. DES COURS 272, 283 (I, 1962) ("... practical difficulties of assembling primary source material."); Brudno, *Review of Considerations Arising in Foreign Oil Operations*, NINTH ANN. INSTITUTE ON OIL AND GAS LAW AND TAXATION 397 (1958) ("Information as to the details of existing concessions is sparse, and that as to the actual tax results of operating under these concessions is elusive."); Guldberg, *International Concessions*, A. *Problem of International Economic Law*, 15 NORDISK TIDSSKRIFT FOR INTERNATIONAL RET 47, 50 (1944) ("... [M]ost of the concession agreements which are reproduced here are of older concessions. This is due to the fact that concession agreements are nearly never published. They are jealously hidden. . . .")

<sup>2</sup> In Indonesia the "work contracts" for the development of hard minerals are quite different from the "production-sharing contracts" for the development of oil. Compare, e.g., Contract of Work between the Republic of Indonesia and P. T. Kennecott Indonesia (Nov. 1, 1969) (for the development of copper) and Production-Sharing Contract between P.N. Pertamina and Phillips Petroleum Company (1968). Unless otherwise indicated, specific contracts are in the personal files of the authors.

<sup>3</sup> Many so-called "work contracts" are essentially the same as the traditional concession. The main distinction appears, in many cases, to be simply the minor issue of the point at which title to the mineral is vested in the foreign company.

<sup>4</sup> In the early 1960's in Indonesia a number of "work contracts" for the exploration and exploitation of oil were negotiated. They were essentially profit-sharing arrangements. See, e.g., Contract of Work between P.N. Pertambangan Minyak Nasional and P.T. Stanvac Indonesia (1963). Reproduced in 3 ILM 243 (1964). The recent hard mineral "work contracts" provide for the imposition of a normal corporate income tax. See Contract of Work between Indonesia and P.T. Kennecott Indonesia, note 2 *supra*.

that) Kennecott shall be, and hereby is appointed, the sole contractor for the Government with respect to the Contract Area,<sup>6</sup>

than it would an agreement characterized as a "concession agreement" which provides, as the Liberian *Gewerkschaft Exploration Concession Agreement*<sup>6</sup> did, that

The Government . . . grants to the Concessionaire . . . the exclusive right and privilege to . . . exploit deposits of all kinds of ores. . . .<sup>7</sup>

Aside from the possible implications for calculating compensation in the case of nationalization,<sup>8</sup> the difference between the Liberian agreement and the Indonesian contract is largely one of terminology and of the point at which title to the resource passes to the investor. But choice of terminology may be crucial to a country's sense of sovereignty and control.

Contract provisions may differ substantially in terms of economic significance. The economic implications of agreements can be compared by projecting cash flows under alternative assumptions about the future and discounting these flows to a present value.<sup>9</sup> Yet, the political and psychological issues are, in most cases, of overriding importance in the selection of a particular form of agreement.

Although the terminology is often confusing and inconsistent, it is possible to discern regularities in the various forms of arrangements which accord with a host country's bargaining power and negotiating skills, differences in the structures of various industries, and the interests of the particular company. Within certain countries and within certain industries, one can observe the influence of changes in relative bargaining powers. The pattern is frequently a shift from traditional concession agreements in which the terms were primarily financial to forms in which the government reserves to itself substantial participation in and control over the venture.

An examination of the major types of agreements provides a framework for understanding some of the complex technical and strategic problems faced by both parties as well as some of the approaches commonly em-

<sup>6</sup> *Id.*, Preamble; see also Art. 1(a).

<sup>8</sup> Concession Agreement between the Republic of Liberia and the *Gewerkschaft Exploration Company*, Dusseldorf, West Germany (1958) in Chapter 33 of the Acts Approved by the Legislature of the Government of the Republic of Liberia during the 1958-59 Session.

<sup>7</sup> *Id.* Art. 1.

<sup>8</sup> These implications may, of course, be very important. On this issue, see 2 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* at 78 and 111-12 (R. Lillich ed. 1973).

<sup>9</sup> This has been done by us for host governments and by others in unpublished materials. See E. G. Warner, *Mixed International Joint Ventures in the Exploration, Development, and Production of Petroleum*, June 1972 (unpublished M.S. thesis, Sloan School of M.I.T.); W. T. Levy Consultants Corp., N.Y., *A COMPARATIVE EVALUATION OF MAJOR CONCESSIONARY ARRANGEMENTS NOW IN EFFECT*, cited in Warner at 40, 60. See also T. R. Stauffer, *Economics of Petroleum Taxation in the Eastern Hemisphere*, a paper delivered at an OPEC seminar on International Oil and Energy Policies of the Producing and Consuming Countries (Vienna, June 30-July 5, 1969).

ployed to achieve accommodation to the political and financial needs of the parties. For analytical convenience, we have classified agreements under the following three rubrics: the Traditional Concession; the Modern Concession; and Production-Sharing, Service, and Work Contracts.

#### MINING CODES AND AD HOC AGREEMENTS

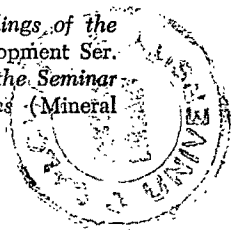
The terms governing the relationships between a foreign investor in mineral development and the government of a developing country are usually set forth in ad hoc arrangements. Although mineral producing countries usually have general mining codes, foreign investment laws, and general income tax codes, these laws often allow government officials considerable latitude in shaping individual concession arrangements to fit the particular circumstances.

Many mining codes establish a general framework within which mineral contracts are negotiated. The 1971 Peruvian General Mining Law, for example, dealt with such basic problems as affirmation of state ownership of minerals, the granting of prospecting and exploration permits, the role of the state in mining operations, tax rates, the roles of various government agencies in granting and supervising concessions, and welfare and security of mine workers. The law also set forth detailed provisions relating to such subjects as causes for lapsing or revocation of a concession and fines to be imposed for certain transgressions.<sup>10</sup> These are matters which are set forth at length in some individual agreements, but which, aside from tax rates, seldom need special treatment. Their inclusion in a general mining code reduces the scope for bargaining, and standardization may make them easier for the host government to enforce. Moreover, their presence in the general laws tends to keep them from surfacing as terms to be modified if negotiations are reopened.

In petroleum, where governments have had considerable experience to draw upon and where many of the terms have become standard, less flexibility is evident in the negotiation of specific contracts than is typical of hard minerals. The Libyan Petroleum Law of 1955, for example, included a standard form of concession which was to be used for all oil concessionaires in the country. However, even for petroleum there are exceptions. The Indonesian Petroleum Law of 1960 (which governed oil contracts into

<sup>10</sup> Peru, General Mining Law: Decree Law No. 18880 (Lima: Ministry of Economics and Finance, Office of Public Relations, 1971). A number of countries legislated new mining codes in the first half of the 1970's. See, for example, Ecuador, Mining Development Law (Supreme Decree 101 of January 24, 1974), U.S. DEPT. OF INTERIOR, BUREAU OF MINES, 71 MINERAL TRADE NOTES, April 1974, at 7; Saudi Arabia, Mining Code 70 *id.*, June 1973, at 20; Sudan Mines and Quarries Act, 1972, *id.*, May 1973, at 15.

For general information on mining legislation, see UN ECAFE, *Proceedings of the Seminar on Mining Legislation and Administration* (Mineral Resource Development Ser. No. 34), UN Doc. E/CN.11/919 (1969) and UN ECAFE, *Proceedings of the Seminar on Petroleum Legislation with Particular Reference to Offshore Operations* (Mineral Resource Development Ser., No. 40), UN Doc. E/CN.11/1052 (1969).



the 1970's) nowhere specified the contents of petroleum contracts. Indeed, the production-sharing contract—the form of agreement used in Indonesia—was not mentioned in the 1960 law.

In general, ad hoc agreements for the exploitation of minerals in developing countries cover a wide range of issues, usually including such matters as taxation, import and export regulation, employment policy and conditions, management structure, exchange control, company and state rights and obligations, and infrastructure. Many concession agreements are an expression of virtually all the laws that will govern the company's operations in the country.

In the advanced countries one rarely finds comprehensive agreements of the type found in the developing nations. In the industrialized countries, the mining firms are usually subject to the general laws of the land; only a few narrow issues may be handled on a company-by-company basis.<sup>11</sup> But there are a number of reasons why most developing countries rely heavily on ad hoc arrangements: the special nature of the multinational company; the major role that the foreign extractive company typically plays in the general economic development of the country; and the legal tradition of the nation.

The multinational enterprise brings a bundle of problems that are usually inadequately covered by the legal system of the developing country. For example, company pricing among affiliated entities in different countries creates difficulties for tax and exchange control authorities. The income tax laws and exchange regulations in many developing countries were designed solely to govern locally owned business operations; they simply do not contain the principles and regulations required to handle transactions among affiliated companies. Most host countries have not had the need or the resources to draft general comprehensive mining, income tax, and company laws appropriate for regulating the multinational enterprise. Ad hoc arrangements provide a way of handling the problems.

The importance of mining activities in many developing countries provides an additional incentive for ad hoc arrangements. The operation of the foreign extractive enterprise frequently occupies a major role in national budgetary planning. In Zambia, for example, 46 percent of gross domestic product in 1969 was attributable to a few large mining firms. In Liberia, the income from four concession operations accounted for almost 65 percent of income tax revenue for 1968. In such a situation, general legislative approaches to govern the terms of mineral firms are not particularly attractive to government officials when a few agreements can be tailored directly to the circumstances.

In addition, the legal traditions of many host countries do not favor comprehensive codes. Rather, the tradition may be one of reliance on regulations and administrative decrees within a system in which general laws provide only broad guidelines. In some instances, the ad hoc concession

<sup>11</sup> For details, see OECD, *THE EXPLORATION FOR AND EXPLOITATION OF CRUDE OIL AND NATURAL GAS IN THE OECD AREA INCLUDING THE CONTINENTAL SHELF; MINING AND FISCAL LEGISLATION* (1973).



agreement plays the role of a specific administrative regulation which elaborates a general law's policy directives.

It is not only the host government that may favor ad hoc agreements. Many foreign investors themselves seek such agreements to decrease the uncertainty of the investment. Unsure whether the political process in the host country is such that the general laws will develop in reasonable ways, investors turn to agreements the terms of which will be fixed over a long time period. The result is that investors seek greater guarantees of stability in developing countries than they would dare hope for in similar projects in advanced countries. In the late 1960's, for example, Australian and British investors negotiated an ad hoc arrangement in the Australian territory of Papua New Guinea (for the Bougainville copper project) even though the general laws in Papua New Guinea were similar to those of Australia, in which they already had operations. Although the Bougainville agreement did provide certain important tax advantages not available under the general laws, one of its principal features was to freeze the general tax provisions in their status at the time the agreement was reached. As a result, a few years later the company was operating under a more favorable tax regime in Papua New Guinea than it faced in Australia. Both governments had changed their taxation of mining operations. In Australia, the company was subject to the changes. In Papua New Guinea, the ad hoc agreement froze the tax levies applicable to the project.

A few developing countries have tried to avoid ad hoc contracts, but their success has been limited. Faced with a major investment, they usually revert to individual negotiations. The economic and political consequences are too important to be left to general laws that may not cover the situation adequately. Malaysia, for example, has long relied on general legislation to govern most of the conditions for small tin investments. When the prospects of a large copper development appeared in 1970, however, the government made sure that special negotiations were conducted, and that the federal government, not the state government (as in the case of tin), represented the nation.

Although successful efforts to abandon entirely arrangements that are tailored to a particular enterprise have been limited, in most countries the investor has been subject to general laws which govern a progressively wider area of activities. The host government may specify in its general legislation the tax regime, labor laws, and other terms to govern investment in a particular sector. This trend may be reinforced as foreign investors increasingly recognize that ad hoc arrangements do not provide the long term guarantee that they purport to give. The general legislation may, in practice, give more certainty than ad hoc contracts that purport to be binding for 15 or more years, but which in reality are changed as bargaining powers shift. In fact, by 1975 in a few countries the only area of significant bargaining concerned equity participation. With most of the terms fixed by law, including tax provisions, participation in ownership becomes the principal vehicle for the parties to strike a bargain that reflects their relative bargaining powers.

## THE TRADITIONAL CONCESSION

The agreements between foreign companies and host governments in the first half of the century were generally recorded in simple documents in which the concessionaire was given almost unrestricted rights in exploiting one or more natural resources. Typically, the concessionaire was granted extensive rights over a very large land area, often much larger than an investor could be expected to develop within a reasonable time period.<sup>12</sup> The period of the contract was usually very long; in many, the terms were to run for 50 or 60 years or more.<sup>13</sup>

*Royalties as the Initial Basis for Calculating Financial Obligations*

The financial (and other) obligations imposed on investors in those early days were generally limited. Contracts which were negotiated from the turn of the century through the 1940's normally required the concessionaires to make payments based on the number of physical units of output or on the value of output from particular mines. Although these royalty payments accounted for by far the greatest portion of government revenues from the concession, a nominal land tax was also usually imposed on the area under the concessionaire's control.<sup>14</sup>

Many of the earliest concession agreements called for royalties based on volume of output, rather than on value. Oil agreements illustrate the pattern. From 1900 to 1950 most oil concessions relied on the payment of royalties based on the tonnage of crude oil produced. A few attempts to collect income taxes were made early in the history of oil concessions but they were abortive. The 1920 agreement between the Persian Government and the Anglo-Persian Oil Co. called for an income tax on the worldwide income of the enterprise, excluding only profits arising from transportation of the oil.<sup>15</sup> The experiment was premature and short lived. The contracting parties reverted to royalty arrangements. The Iraqi agreement with the Khanaqin Oil Company in 1926 provides a more typical example of an oil contract of that era. It called for payment of four gold shillings

<sup>12</sup> In describing a 1906 concession grant by the Congo Comité Spécial du Katanga to the Union Minière du Haut-Katanga, two commentators wrote that "the Company's rights were so extensive as to partake of quasigovernmental powers akin to those accorded the great trading companies of an earlier concession era." Wetter and Schwebel, *Some Little Known Cases on Concessions*, 40 BRIT. Y.B. OF INT. LAW 193 (1964). Fifty years ago the United Fruit Company owned or leased about 5,000 square miles of tropical lands, using only about 10% productively at the time. Fox, *United Fruit and Latin America*, 4 HARVARD REV. 32, 33 (No. 4, 1968).

<sup>13</sup> The lease given to the Firestone Company by the Liberian Government in 1926 was to run for 99 years and covered one million acres of land. See W. C. Taylor, *THE FIRESTONE OPERATIONS IN LIBERIA* xi (Washington: National Planning Association, 1956).

<sup>14</sup> See the various land taxes listed in Ghana, *Report of The Commission of Enquiry into Concessions* 32-79 (Accra-Tema: Ministry of Information, 1961).

<sup>15</sup> H. CATTAN, *THE EVOLUTION OF OIL CONCESSIONS IN THE MIDDLE EAST AND NORTH AFRICA* 8 (1967).

per ton of net crude oil produced and saved.<sup>16</sup> In another case, the 1949 agreement between the Saudi Arabian Government and Getty Oil provided for a royalty of U.S. \$0.55 per barrel.<sup>17</sup>

Iron ore, timber, and even plantation agreements in developing countries followed patterns similar to that of oil. The original (1945) agreement between the Government of Liberia and the Liberian Mining Company, Ltd. (LMC) provided for a basic royalty of five cents per ton on all iron ore shipped.<sup>18</sup> Timber agreements, in the same pattern, normally called for a "stumpage fee" based on certain units of output.<sup>19</sup> And the United Fruit Company paid one cent per stem for bananas harvested in its fields.<sup>20</sup>

Many later agreements in such industries abandoned the fixed cash royalties in favor of royalties based on a percentage of the export price of the resource.<sup>21</sup> The LMC agreement in Liberia combined the fixed payment per unit of ore with a royalty that was based on the value of the ore. It provided that if, in any year, the average price of pig iron were to be more than one hundred and fifteen percent of the average price of pig iron for the prior ten years, an additional royalty was to be paid by the producing firm.<sup>22</sup> Similarly, timber and plantation arrangements have become more complex in many countries.<sup>23</sup>

Compared to income tax arrangements, profit-sharing contracts, and production-sharing agreements of more recent vintage, these early concession agreements have two distinct advantages for the host government. First, the royalty payment is a particularly easy type of levy to administer. To collect a tax based on units of output, the government need only have a physical count of the volume of production or shipments made by the concessionaire. Secondly, the royalty seems to guarantee a certain payment to the government for the depleted resources irrespective of the company's profits and the world market price for the resource. As long as there is production or sales, the government should receive revenue. This feature has its attractions to a government worried about the stability of its revenues.

In spite of the advantages of royalty arrangements, it was a rare concession agreement by the late 1960's that relied entirely on royalties as the source of payment to the host government. There were indeed some agreements, such as that governing Le Nickel in New Caledonia, which

<sup>16</sup> *Id.* at 33.

<sup>17</sup> *Id.* at 34.

<sup>18</sup> Concession Agreement between the Government of Liberia and Liberian Mining Company, Ltd. (Aug. 27, 1945), Art. 9(a); Approved by an Act of the Legislature January 22, 1946.

<sup>19</sup> See, Ghana, *Report* . . . , *supra* note 14, at 32ff.

<sup>20</sup> M. WILKINS, *THE MATURING OF MULTINATIONAL ENTERPRISE* 127 (1974).

<sup>21</sup> The Ghana Commission of Enquiry into Concessions concluded in 1961 that "all mineral and timber royalties should [henceforth] be required by law to be computed on a percentage of the sales price. . . ." Ghana, *Report* . . . , *supra* note 14, at 10.

<sup>22</sup> See note 18 *supra*.

<sup>23</sup> For an example of a stumpage fee adjusted in accordance with the wholesale price of standard newsprint, see the Agreement between the Province of Newfoundland and Newfoundland Pulp and Chemical Co., Ltd. (July 5, 1960), Sec. 14.

still depended on royalties in 1974. However, the major disadvantages of royalties had led to a dramatic increase in the importance of other kinds of levies.

### *Increasing Importance of Income Taxation*

By the 1950's the concept of taxation of concession income had gained general acceptance in the arrangements between oil companies and their host governments. The levy on income was implemented either through a direct income tax, frequently at a rate of 50 percent, or through a "sharing of profits" arranged in a way that made it roughly equivalent to an income tax.<sup>24</sup>

The shift from royalty to income tax in oil is well illustrated by the figures for Venezuela. The following table shows that the portion of government revenue accounted for by income tax increased dramatically, at the expense of royalties, during the post World War II period.

PERCENTAGE OF VENEZUELAN GOV'T REVENUES FROM FOREIGN  
PETROLEUM FIRMS THAT CAME FROM VARIOUS LEVIES

Year	Royalty	Income Tax	Surface Tax	Customs	Other	Total
1938-1940	58.9%	0.0%	15.7%	21.7%	3.7%	100%
1941-1945	60.0	7.5	13.4	16.2	2.9	100
1946-1950	54.9	30.7	3.5	7.7	3.2	100
1951-1955	54.5	34.3	2.1	4.4	4.7	100
1956-1960	52.8	40.7	1.1	2.4	2.9	100
1961-1965	50.0	46.7	0.5	0.6	2.3	100

Source: Georg K. Gabriel, *The Gains to the Local Economy from the Foreign Owned Primary Export Industry: The Case of Oil in Venezuela* 92 (unpublished D.B.A. thesis, Harvard Business School, May 1967).

More slowly the same kind of evolution has occurred in other extractive industries.

In oil, hard minerals, timber, and plantations, the shift from royalty to income tax has taken place in two ways: first, existing agreements have been amended, either to substitute income taxation for royalty payments or to supplement royalties with levies on income; second, new agreements negotiated in the 1950's and later have incorporated income tax or profit-sharing principles as the primary source of government revenue.

The Liberian Mining Company Agreement (LMC), one of our previous examples of a royalty-based agreement, illustrates the changes that have taken place. That arrangement has moved from one relying on royalty to one relying on income taxation as the source of government revenue. The original agreement, providing for a fixed basic royalty and a supplementary royalty based on price, was changed by a 1952 collateral agreement, in which LMC agreed to the government's "participation in profits" after a certain point.<sup>25</sup> Participation was to begin when LMC had liquidated its debts and had brought its "recovery of investment" to four million dollars, or by 1957, whichever came first. For the first five years from that date,

<sup>24</sup> See CATTAN, *supra* note 15, at 44.

<sup>25</sup> See note 18 *supra*.

the government was to receive 25 percent of profits. During the next ten years, it was to receive 35 percent of profits. Thereafter, it was to receive 50 percent of profits.<sup>26</sup> The income tax was to supplement the royalty payments which would continue. In 1965 the basic agreement was further amended to provide that the 50 percent participation rate would take effect as of January 1, 1965, and that participation was to be in lieu of royalty payments.<sup>27</sup>

Although in most agreements income tax became the principal source of revenue, royalties by no means disappeared. Even with an income tax, royalties could serve the purpose of assuring the government of a minimum payment for the extraction of the resources when low prices led to little or no profits. For example, the structure of the Indonesian Kennecott agreement in West Irian in the early 1970's guaranteed that the government would receive a royalty of 3.6 percent on copper even if low prices were to lead to low taxable profits. Across the border in Papua New Guinea, the higher income tax rates of the Bougainville arrangement promised the government more when profits were high, but the low royalty rate could leave the government in an unfavorable position should profits turn out to be low.

In governments with federal systems, royalties have sometimes been retained as a payment to states or provinces, with the income tax going to the federal government.<sup>28</sup> In some cases, a royalty that is progressive with the prices of the mineral has been designed to capture for the government a substantial portion of the "windfall" profits when prices are high. Malaya, and later Malaysia, for example, had complex royalties for tin that were designed for this purpose. In 1973, a similar royalty was being proposed in British Columbia to apply to all mining in that province of Canada.

The imposition of income taxes has resulted in a significant increase in the burden on the administrative capacity of host governments. To assess income tax, governments must be able to verify the sales prices of the resource and the calculation of deductions for expenses that are charged against gross income.<sup>29</sup> In many cases the transactions that led to the income or expenses have been with entities affiliated with the foreign investor. In those cases, the firm might use prices that are not those of arm's length transactions or it might utilize other techniques to shift profits from one tax jurisdiction to another. The administrative machinery of many host countries would simply have been unable to deal with these problems in the first half of this century. Most governments were still struggling to obtain adequate administrative capability in the mid-1970's.

<sup>26</sup> See Collateral Agreement of March 12, 1952, approved by an Act of the Legislature March 10, 1953.

<sup>27</sup> Amending and Tax Agreement dated as of January 1, 1965 between the Government of the Republic of Liberia and Liberian Mining Co., Ltd., Clause 1.

<sup>28</sup> This is the case in Malaysia and Canada, for example.

<sup>29</sup> An exception to this is the situation where, as has been the case in petroleum, a posted price is used.

The administrative problems that result from the shift to income taxes have been recognized repeatedly. In a study undertaken in the mid-1950's, for example, the difficulty in income tax administration was mentioned explicitly as a major reason for retaining the per-unit stumpage fee for timber concessions in Ghana.<sup>30</sup> In the early 1970's, one government consultant recommended royalties as the only tax for the proposed Asahan Smelter in Sumatra, in recognition of the administrative problems Indonesia would have with an income tax on an operation involving primarily transactions among affiliated companies. In 1974 an official from Guyana claimed that Reynolds had so set its transfer prices that it had never shown a profit on bauxite mined in that country. The tax on income had produced no revenue beyond a minimum sum that applied no matter what profits were reported.<sup>31</sup>

With the difficulties involved in the administration of income tax arrangements, it is little wonder that many governments have been disappointed initially in their receipts from the tax. In one case, we calculated that inability (or unwillingness) to administer properly the complex tax provisions of an agreement was costing the host government at least 35 percent of what seemed to be due under the terms of the arrangement.

The shift away from royalties to some form of income taxation has, however, been based on a realistic perception of the level of payments that the host government can collect under the two types of levy. One problem concerns the "floor" on payments that the royalty is supposed to provide. Although the per-unit royalty purports to guarantee the government a minimum level of income on its resources, in practice royalties have from time to time not been collected from companies that were not profitable. This has been the case for Zambian copper and for Malaysian tin, for example. Another difficulty has been in the level of revenue that could be collected. In practice, royalties have seldom represented a significant portion of actual company profits. Clearly, firms have been reluctant to take on heavy royalties. From the company's point of view, a commitment to a large royalty, particularly in the early years of an extractive operation, is potentially dangerous. At the outset, the firm faces a great deal of uncertainty whether it will be able to extract the natural resource profitably. The cost of the royalty represents to the firm an additional cost of extraction, one that will be incurred whether the project is profitable or not. On the other hand, a commitment to pay an income tax on profits if they do materialize appears less risky. If there are no profits, the company has no obligation to pay tax to the host government. Under a pure income tax arrangement, the firm incurs significant obligations only if profits are high. With a desire to avoid risk, the foreign firms have usually been willing to agree to an income tax that, if the expected level of profits results, would be larger than any payments that would be agreeable under a royalty arrangement.

Although royalties had generally declined in importance by the early 1970's, the pace of decline was uneven. Indeed, it was not certain that the

<sup>30</sup> Ghana, *Report . . .*, *supra* note 14, at 10.

<sup>31</sup> Private interview.

days of royalty were numbered. In the case of oil, tax arrangements had reverted to something similar to royalty arrangements. The posted price had become the basis of calculation of profits in most agreements and this price itself had become a subject of negotiation. In those countries where the expenses that could be deducted in calculating income tax were limited to a percentage of the value of the output, the income tax became, essentially, a large royalty if expenses exceeded the stated limit. This effective royalty appeared to be short lived. Late in 1973, the move was again in the other direction as oil-producing countries began to tie the posted price to the market price plus an increment. By 1975, changes were placing the oil companies more in the position of service contractors than in the role of tax or royalty payers.

In an oligopolistic industry such as oil, large royalties could be tolerable for the companies. Periodic falls in price were hardly the threat that they represented in, say, copper. Thus, profit levels seemed to be more predictable for the producing companies. Moreover, the form which the effective royalty took enabled it to qualify as an income tax for tax credits in the home countries of the oil firms. Where profits are predictable and where the royalty generates tax credits, the ease of administration provided by royalty arrangements can make them an attractive form of levy.

### *Other Changes*

The general shift from royalties to income taxation as the primary source of government revenue was probably the most significant change in the early development of concession agreements. But there were many other changes. The later agreements usually included a number of terms that were designed to bring benefits other than revenue to the host country.

Generally, the host government considered it important to introduce into the agreements, or into the general laws of the country, provisions that were designed to promote "linkages" between the extractive operation and the rest of the economy. As host countries perceived the possibilities of using the foreign firm more fully to promote local development, they sought ways to influence the actions of the firm.

Requirements that the project purchase goods of local manufacture and requirements that the company hire and train local citizens were incorporated in a large number of arrangements. A number of agreements also required the foreign company to guarantee access for local users to such infrastructure as roads, railroads, and communications systems. Provisions were made for the concessionaire to build and operate schools, hospitals, and other services for the company's local workers. The foreign firm was sometimes encouraged or required to contribute funds and talent to local community development or to educational, agricultural, or technical institutions.

At the same time, rudiments of general labor and mining codes appeared, either in the agreements or in the general laws of the host country. Ad hoc agreements or the mining laws would specify such matters as the minimum grades of ore that must be mined and the quality of timber that

must be harvested. Safety and pollution standards were introduced, though frequently in vague language and with little provision for enforcement.

In addition, the terms of agreements typically gave some attention to the rights of third parties. These included, for example, the rights of local residents to payment for land that was taken for the concession and to access to traditional timber sources, agricultural land, water sources, and sacred sites.

### *The Advantages of the Traditional Concession*

With modifications in taxation and linkage provisions, the traditional form of concession agreement has survived into the 1970's in many countries and for many industries. The original Bougainville agreement and some of the concessions for hard minerals negotiated in Indonesia in the late 1960's were, for example, similar in format and substance to hard mineral agreements negotiated elsewhere in the 1940's and 1950's.

There is much to be said for the traditional form of concession. The agreements are often less complicated and may therefore be easier to administer than some of the newer forms of agreements. The income tax provisions, if well conceived and well drafted, can be relatively straightforward. A country with a weak income tax administration or without a sophisticated governmental body to police an agreement might well prefer a traditional agreement, which raises minimal administrative problems, to one which is so complex that the governmental machinery simply cannot cope with its administration. Government income might well be higher when complex, though purportedly more favorable, financial arrangements are avoided.<sup>32</sup>

Nevertheless, many developing countries have been under pressure to break away from the traditional form of agreement. The pressure has usually been: (1) for increased government participation in the ownership of the enterprise; and (2) for an increased governmental role in the management of the extractive operation. The result has been agreements that differ significantly in structure from the traditional concession arrangements. In most cases, they have been more complex.

## THE MODERN CONCESSION

### *Equity Sharing*

In the late 1960's and early 1970's, there was a rapid increase in the number of agreements that provided for some local participation in the ownership of the firm that extracts raw materials. Major participation has usually meant ownership of shares by the host government. The most publicized cases of participation were in petroleum. In the major oil-producing nations, negotiations in the early 1970's led to agreements under which government participation in a number of operating companies was

<sup>32</sup> See Wedderspoon, *Simplifying Taxes in East Africa*, 6 FINANCE AND DEVELOPMENT 51 (1969).



scheduled to reach 51 percent by 1983. This timetable has already been accelerated in a number of countries. Although public awareness of participation was created by oil in the 1970's, the trend had started earlier and was not limited to petroleum.

Equity sharing, or "participation," may or may not bring the government an effective voice in management decisions within the operating company and may or may not mean that the government plays an active role in other activities leading to the ultimate disposal of the resource. The concept of participation as it has been developed in the oil industry has been characterized as "pseudoparticipation," since it does not assume that the host country produces or sells the oil, or transfers it downstream for refining and sale. Rather, participation has been criticized by one observer simply as "an ingenious way of further increasing the tax per barrel without touching either posted prices or nominal tax rates."<sup>33</sup> But ownership itself has political appeal to governments, even when actual participation in management may be minimal. Many mechanisms have been devised to bring about the political benefits of joint ownership.

One form of equity-sharing agreement is that in which the government obtains equity interest without a financial contribution, but in exchange for all or part of its right to levy an income tax. The economic advantages to the host country of such an arrangement are not always self-evident. Some government negotiators have believed that an exchange of the right to impose, say, a 50 percent income tax for 50 percent of the equity is an even exchange. It often is not. In general, holding 50 percent of the equity is, in purely financial terms, less attractive to the government than is an income tax at a 50 percent rate. Under the ownership arrangement, the government receives half the dividend payments. But half the dividend payments is usually less than half of the taxable profits of an enterprise. Dividends come out of the funds that remain after the repayment of principal on debt and after the provision of funds out of profits for reinvestment in the on-going operation. Under a normal equity-sharing arrangement, the government shares in capital expenditures; under a tax arrangement, the government takes its funds before the deduction of such expenditures. In rare cases, however, net cash flow from which dividends are paid may be greater than taxable profits.

As an illustration of the problem, consider the Liberian American Company (LAMCO) agreement of 1960. As a co-owner of the Swedish interest in the LAMCO-Bethlehem Steel joint venture, the government was to receive, as dividend payments, half of the annual dividends accruing from the Swedish interest.<sup>34</sup> The dividends were to be in lieu of royalties and income tax. Because of the low ratio of equity to loan capital, a substantial

<sup>33</sup> Adelman, *Is the Oil Shortage Real?*, 9 For. Pol. 69, 84 (Winter 1972-73).

<sup>34</sup> Joint Venture Agreement between the Liberian American Mining Co. and Bethlehem Steel (April 28, 1960). Chapter LXV of Acts Passed by the Legislature of the Republic of Liberia During the Session 1959-1960. For a detailed discussion of the financial structure of the LAMCO Joint Venture, see R. W. CLOWER, *et al.*, *GROWTH WITHOUT DEVELOPMENT: AN ECONOMIC SURVEY OF LIBERIA* 210 ff. (1966).

amount of the funds generated (estimated to be about \$15 million a year for the first ten years of production)<sup>35</sup> was to go to the repayment of debt and interest.<sup>36</sup> While under a normal taxing arrangement the government would receive, through taxes, a portion of the profits calculated before the repayment of debt, under the equity-sharing arrangement the government shared in "profits" calculated after repayment of debt was deducted. Although there could have been a higher rate of participation that would have been equivalent, over time, to the surrendered taxes, the equity-sharing arrangement at 50/50 did not benefit the government to the extent that taxes at 50 percent would have.

Actually, the LAMCO arrangements were even less favorable to the government than has been suggested. Two other factors affected the "profits" in which the government was to share: the Export-Import Bank, as a condition of its loan, required that \$25 million in profits be set aside by 1970 in a special reserve; and there were to be deductions from gross profit for "equipment replacement" (at a rate of about \$0.30 per ton) in addition to what was to be allowed for depreciation. These items were to be deducted from the company "profits" in which the government was to share. Under the usual taxing arrangement, these items would not have been deductible in the calculation of net taxable income. The result was that the Liberian Government paid for a substantial part of the company's capital facilities out of "forgone" dividends.

Reinvestment of profits by the mining enterprise may, of course, mean larger payments out of earnings sometime in the future. But if reinvestment promises adequate returns, the foreign company would probably provide all of the funds, in the absence of government participation, leaving the government with its increased future revenues from taxes in any case.

The exchange of some rights to tax for equity may, of course, make political and economic sense. In fact, that exchange is explicit in many of the equity-sharing agreements, even where some income tax remains. Much more unusual is the case where the government has paid for its share of equity at the price paid by other stockholders and, at the same time, has given up its right to tax profits. The Liberian-National Iron Ore Co. Agreement of 1958 may be a unique example.<sup>37</sup> The financial con-

<sup>35</sup> CLOWER, *supra* note 34, at 219.

<sup>36</sup> Analysis suggests that much of the loan capital might better have been characterized as equity rather than debt. In such a case "interest" payments would be treated as "dividend" payments and would not be deductible from gross income for tax purposes. This problem is discussed in detail in Chapter 3 of our forthcoming book.

<sup>37</sup> Concession Agreement between the Government of the Republic of Liberia and the National Iron Ore Company, Ltd. (March 13, 1958). Art. 7 reads:

Since the Government presently owns, or has the right to acquire, one-half of the shares of the Concessionaire to be issued, the Government forever waives all royalty. . . . In lieu of all other Liberian taxes . . . the Concessionaire shall pay an exploitation tax and a surface tax.

In commenting on the NIOC arrangement, an economic survey team has observed that "the government's equity participation in the National Iron Ore Company is extremely costly. It has invested \$5 million as a stockholder, just half of the total equity

sequences of this agreement were so disadvantageous to the government that the most charitable interpretation must be that the issue was not clearly understood by the government negotiators.

A common pattern in more recent equity-sharing agreements has been for the government to "buy" shares of equity and to retain all its rights to tax corporate profits. In the vast majority of cases, the government contribution has been made only after the existence of a commercially viable source has been proved, that is, after a significant portion of the uncertainty has been eliminated. Two agreements, (1) the 1970 nickel contract between the Government of Colombia and Chevron Petroleum Company and the Hanna Mining Company and (2) the 1967 Bougainville Copper Agreement provide examples of this type of arrangement.<sup>38</sup> The Colombian Government, through its wholly owned Instituto de Fomento Industrial (IFI), entered into a joint venture with the Hanna Mining Company. The government retained the right to tax both the joint venture and any profits accruing to Hanna Mining from its Colombian operations. Similarly, Papua New Guinea bought equity in the Bougainville mine while imposing a gradually rising rate of income tax.

To share in ownership, the host government may obtain an interest in a contractual joint venture, rather than holding shares in an incorporated entity. In 1965, the National Iranian Oil Company, for example, provided 50 percent of the capital in a partnership for offshore oil, with the other half invested by a consortium of foreign firms. In this arrangement, the government retained its right to tax.

When a shift is made in a particular project from a traditional arrangement to one that provides for sharing of ownership, the steps may be complex and confusing. An illustration is the Chilean Government's purchase in 1969 of shares in Kennecott's subsidiary. In the change, the government acquired 51 percent of the shares in the copper mining operation, but the taxing arrangements were revised considerably at the same time. In fact, the result of the combined changes appeared to be that the burden on the company of taxation and dividends paid to the government remained approximately the same after the new arrangement as before.<sup>39</sup>

The Zambian Government's takeover of 51 percent of the shares in its copper operations in 1969 had much in common with the Chilean change. Shares were purchased on the basis of book value and paid for with 5 percent government bonds. At the same time, there was a major re-

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capital. As a 50 percent stockholder, it will get 50 percent of net (distributed) profits, the other shareholders paying zero income taxes on their 50 percent of net profits." CLOWER note 34 *supra*.

<sup>38</sup> Agreement between Instituto de Fomento Industrial and Compañía de Níquel Colombiano, S.A. (July, 1970). See *Colombia Mine Accord Regarded as Pace-Setter*, N.Y. Times, Aug. 15, 1970, at 31. The Bougainville Agreement was ratified in 1967. See Territory of Papua and New Guinea, Mining (Bougainville Copper Agreement) (Ordinance 1967). The Agreement was amended in 1974 (See Mining (Bougainville Copper Agreement) (Amendment) Bill 1974.)

<sup>39</sup> Private interviews.

vision of the tax arrangement, thought by some observers to favor the foreign companies.<sup>40</sup>

There are a number of technical problems that should be dealt with in the negotiation of equity-sharing arrangements. Two important ones relate to the rights of one partner to purchase shares offered by another and the method by which any expansion of the project will be financed. In Zambia, the copper agreements assured the government of rights to acquire shares that a minority shareholder wished to sell. In that agreement, funds for expansion were to be provided pro rata by all equity holders.

There are many variations on the equity-sharing theme. An interesting arrangement between the Libyan National Oil Company and Shell Exploration (Libya) Ltd. combined some of the features of ownership sharing with those of production sharing. That agreement provided for a changing division of interest in the project. The national company's share began at 25 percent and remained at that level until production reached 260,000 barrels per day; it was to increase to 50 percent when output reached 500,000 barrels per day. Exploration expenses were to be borne by Shell, which also advanced the state company's share of capital for development and funds needed for operating expenses. The state company was to reimburse Shell for these advances out of the state company's share of production.<sup>41</sup>

Arrangements that allow workers rights of participation could also be considered as variations of equity sharing. The Peruvian General Mining Law of 1971 provided that mining companies were to deduct, free of taxes, ten percent of their net income, four percent as "liquid participation" for Peruvian workers, and six percent for "property participation" by Peruvian workers.<sup>42</sup> The four percent was to go to a workers' cooperative and the six percent was to be invested as shares in the company held by the workers. Once the workers had shares they would be guaranteed one representative on the Board of Directors. Workers' representation on the board thereafter was to be in proportion to equity ownership.

Still rare in the mid-1970's was direct equity sharing between governments, although state companies from developed countries had fairly frequently participated in the exploitation of a developing country's minerals. In early 1973 Guinea had under consideration the creation of two mixed companies to develop the iron ore deposits of Mount Nimba and Mount Simandou near the Liberian frontier. The two companies were to include capital from Guinea, Liberia, Algeria, Nigeria, and Zaire as well as from companies from Japan, Yugoslavia, and Spain. One motivating factor for including Liberia was to link the Guinea operation to the 250 km. railway

<sup>40</sup> Harvey, *Tax Reform in the Mining Industry*, in M. BOSTOCK AND C. HARVEY (eds.), *ECONOMIC INDEPENDENCE AND ZAMBIAN COPPER: A CASE STUDY OF FOREIGN INVESTMENT* 131 (1972).

<sup>41</sup> OECD, *OIL: THE PRESENT SITUATION AND FUTURE PROSPECTS* 91 (1973).

<sup>42</sup> Peru, General Mining Law, Art. 281ff, note 10 *supra*.

which ran from the LAMCO iron ore operation on the Liberian side of Mt. Nimba to a Liberian port.<sup>43</sup> Nigeria decided in 1974 to take a five percent interest in two iron ore companies in Guinea with an apparent view to establishing a Nigerian iron and steel industry, which would stimulate demand for coking coal which Nigeria has in some abundance.<sup>44</sup>

While a general trend toward some variant of increased government participation in the equity of mining enterprises was evident in the early 1970's, some countries have had second thoughts as they approached the issue, especially as the risks became apparent. The Government of Sierra Leone had, in 1969, stated its intentions of taking a 51 percent share in four major mining companies operating in the country. Interest in equity participation was apparently inspired by events in Zambia where the government had taken shares in copper operations. In 1973, however, the Sierra Leone Government, claiming that it did not have sufficient liquid assets, gave up plans to take an equity interest in one of the companies, Sierra Leone Development Company. The prospects for high profits were dim. Although the company was apparently willing to sell shares below book value, the equity participation plan was replaced with an agreement providing for higher taxes and for government representation on the board of directors.<sup>45</sup>

The success of governments in Latin America and Central Africa in obtaining equity in copper operations influenced still other countries. In 1972, the Government of Papua New Guinea passed a resolution in its House of Assembly announcing its goal of substantial equity participation in mining operations in the country. However, when it was faced with a renegotiation of the Bougainville arrangements in 1974, the government decided not to push for greater equity participation. Torn between the apparently conflicting advice of the plethora of advisors that the government called upon, it simply delayed action for months as the various government factions made their views known. In the end, it ignored the calls for more ownership than it already had and simply increased the taxes.

In spite of the problems associated with equity participation, it will almost certainly continue to grow in importance. In countries where taxes are fixed by the general laws, shared ownership provides a way of rearranging the financial benefits on an ad hoc basis to reflect bargaining powers. And mere ownership is often considered an attractive goal.

### *Management control*

Governments often acquire equity for other than purely financial reasons, or for the satisfaction that ownership itself provides. It is often assumed that more ownership gives more control. Increased control over the operations of the foreign firm, either real or imaginary, promises political bene-

<sup>43</sup> *Sekou Touré's Iron Mountains*, WEST AFRICA, Feb. 19, 1973, at 239. But see *Big Bauxite Mine Begins*, *id.*, March 26, 1973, at 421.

<sup>44</sup> *Interest in Nigerian Coal Grows*, *id.*, May 6, 1974, at 535.

<sup>45</sup> *Opting Out of Iron Ore*, *id.*, March 5, 1973, at 303, April 30, 1973, at 577.

fits in addition to the possible financial ones.<sup>46</sup> The extent of the government's share of control may be in proportion to its share of equity ownership. However, in many instances, as we have indicated, it is not.

One device for dissociating equity ownership from control is the assignment of different classes of shares to the different parties. One class of shares may have no voting rights. In some cases, holders of a particular class of shares may be empowered to appoint a certain number of members of the board of directors and those of another class may be entitled to another number, regardless of the claims on the assets of the enterprise represented by the shares. The 1960 LAMCO agreement in Liberia is one example of this kind of arrangement. Although each shareholder had 50 percent of the equity, the holder of Class A shares, the Government of Liberia, could appoint only five members of the board of directors. The holders of Class B shares could appoint six.

The arrangements for control do not, of course, always favor the foreign firm. In a given situation a government may have sufficient bargaining power to insist on a voice in management beyond that represented by its stockholdings. In some cases, a government's class of shares may carry certain rights, but more commonly the agreement itself simply specifies the right of the government to name a certain portion, say 50 percent, of the directors on the operation's board. Moreover, it has not been uncommon in modern concessions for the government to have a veto right over certain kinds of decisions, regardless of the size of its shareholdings. A common mechanism for granting the veto has been a requirement that a unanimous vote of the board of directors be obtained before certain steps can be taken by the management. The presence of at least one government-appointed director can enable the government to block a decision.

Most host governments have chosen not to become involved in the day-to-day operations of the firm. To make sure that decisions of importance reach the board, however, some governments have insisted that a general operating plan be submitted by the line management for the approval of the board. The agreement spells out the contents of the operating plan: usually production volumes, major investments, sales plans, operating budgets, and employment plans. The line management is required to operate within this plan or to seek approval from the board for any departures. In such cases, the government and the company are usually pleased to keep the government out of day-to-day operations, while assuring the government the right to review important decisions.

Perhaps the two central problems faced by a government in structuring its representation on a board of directors of an extractive operation have

<sup>46</sup> It has been suggested that despite the management control provisions in its production-sharing oil agreements, Indonesia's highly touted state oil company, Pertamina, actually exercises little real management control over foreign operations. ROBERT FABRIKANT, *OIL DISCOVERY AND TECHNICAL CHANGE IN SOUTHEAST ASIA—LEGAL ASPECTS OF PRODUCTION SHARING CONTRACTS IN THE INDONESIAN PETROLEUM INDUSTRY* at 21 ff. (Singapore: Institute of Southeast Asian Studies, 1973. Field Report Ser. No. 3.)

been: (1) defining those issues in which it is vitally concerned and (2) assuring that its representatives on the board have the necessary technical data to make intelligent decisions on matters before the board. The Colombian nickel agreement with Chevron and Hanna Mining Company, mentioned above, illustrates one approach to the solution of these problems. During the negotiations with the foreign company, the Colombian Government made a careful appraisal to determine which decision areas were of special concern to the government in its role as a minority partner in the venture and as a sovereign power. It determined that in many areas the interests of the foreign firm and the government would probably coincide. Each party would be interested, for example, in purchasing goods, services, technical assistance, and "know-how" at minimum prices, so long as the suppliers were not parties affiliated to the foreign investor. The Colombian Government would have little need for veto power over such matters. On the other hand, the government was able to define certain classes of decisions in which the interests of the majority and minority parties to the joint venture might diverge or in which national interests might differ from those of the enterprise. These classes of decisions included:

- (1) the purchase or sale of goods, services, technical assistance, or "know-how" from or to a partner or an affiliate of the major shareholder;
- (2) the appointment of a management group and the terms of a management contract;
- (3) the approval of the annual exploration, development, investment, production, and budget plans to govern operations under the management contract;
- (4) the approval of purchases by the operator that represent expenditures over certain amounts;
- (5) the geographical location of facilities;
- (6) the appointment of an auditor for the books of the joint venture and the approval of financial statements;
- (7) the contents of any annual reports of the joint venture operations;
- (8) the mortgaging of any assets of the joint venture;
- (9) the purchase or sale of goods, services, etc., to or from nations unfriendly to Colombia; and
- (10) the use of technology harmful to the environment.

For decisions of these types, government consent was required.

After spelling out the areas of concern, the government negotiators were worried that their representatives would not be sufficiently well informed to make intelligent decisions in all these matters. To help overcome the difficulties, the government made provision in the agreement for the creation of a technical committee, composed primarily of Colombians, the main task of which would be to assure: (a) that adequate training of Colombians would take place, (b) that the government would be apprised of any past or future decisions by the operator which would affect its interests, and (c) that technical information and analysis would be provided

to the government representatives on the board of directors so that they would have an adequate basis for participation on the board.

This approach has its parallel in the United States, where the idea of providing and financing an autonomous staff of technical specialists to assist "outside" directors in making decisions has been put forward. The proposal has come as a response to the increasing recognition that outside board members have rarely been equipped to make complex management decisions or to exercise effective control over day-to-day management.<sup>47</sup> A technical committee promises possible help.

In the Colombian case, the government was the holder of a minority interest. Under the increasingly common arrangements whereby the host government owns the majority of shares, the problems can be reversed. The task is then to provide protection for the foreign company as the minority stockholder.

In Zambia, where the government held 51 percent of the shares in a particular copper concession, the private interests were granted the right to veto expansion plans or appropriations for capital, exploration, or prospecting expenditures. An agreement in Sierra Leone provides another example of minority interests in the hands of the foreign firm. Under a renegotiated agreement with the Sierra Leone Selection Trust, Ltd.,<sup>48</sup> a new company was formed with the capital held 51 percent by the government and 49 percent by SLST. The board of the new company was to consist of eleven directors of whom six (including the chairman) would be appointed by the government. All the operating assets of the old company were to be acquired by the new joint company which would carry on the diamond mining. The government agreed to pay for its proportion of the fixed assets of the business by issuing negotiable bonds and to pay for its share of the net current assets in cash. The joint company was to be taxed on its profits at a rate of 70 percent. The foreign firm was to appoint the first managers to carry on the day-to-day operations of the company.

The agreement had provisions for the protection of the foreign firm, as minority shareholder, as well as guarantees for the government. For the security of the private firm, an affirmative vote of three-fourths of all the directors was required for:

- (1) the termination of the operations of the joint company or the sale or transfer of the assets or rights of the joint company;
- (2) the issue of additional shares, the borrowing of funds, the creation of charges, the making of loans, or the giving of guarantees;
- (3) the appointment or removal of the auditors of the joint company;

<sup>47</sup> Arthur J. Goldberg, *Debate on Outside Directors*, N.Y. Times, Oct. 29, 1972, §3, at 1. See also Levy, *How an Audit Committee Can Help*, N.Y. Times, Dec. 3, 1972, §3, at 16; Townsend, *Let's Install Public Directors*, BUSINESS AND SOC. REV., at 69-70 (1972).

<sup>48</sup> For a full statement of the terms of the new agreement, see Consolidated African Selection Trust Ltd., Report to Members on Agreement with the Government of Sierra Leone, Sept. 11, 1970.



(4) any purchase or sale of any product or assets or any other transaction carried out otherwise than on the best commercial terms reasonably available or in the normal commercial activities of the joint company;

(5) any restriction on the effective implementation of agreements with the government;

(6) the expenditure by the joint company of any funds or the making of any commitments in respect of any new mining operation or facility or the making of any expenditure, considered by at least three directors to be outside the ordinary course of business; and

(7) the appointment of any committee, board, or attorney whose powers included the doing of certain acts.

Many government officials think that equity-sharing arrangements, such as in the Colombian and Sierra Leone cases, can help in reducing some of the political problems associated with foreign activities in the minerals field. The promise, and sometimes practice, of increased control in the hands of the government at least provides politically useful evidence that the government is concerned about national sovereignty. Participation in management, where it actually occurs, may provide experience that hastens the day when the host country is able to operate its mines without the direct involvement of foreign firms.

### *Management Contracts*

Under equity-sharing arrangements or in a situation where the foreign company's shares have been nationalized, the government may want to return the foreign firm to the day-to-day management of the operating company's activities. The usual device for this is the management contract.

Zambia provides an example of the use of a management contract under shared ownership. Part of the terms of the 1969 agreement between the Government of Zambia and Roan Selection Trust (RST), under which the government was to acquire 51 percent equity interest in RST's subsidiary operating in Zambia, included provision for separate management and consultancy contracts.<sup>49</sup> RST was to provide: (1) technical services (including preparing progress reports, long-term plan reports, capital expenditure estimates, advice on operating problems); (2) general services (including advice on the preparation of company reports and financial statements and on the development and processing of minerals); and (3) specialized services (including engineering consultancy services, staff, recruitment).

Under the management contract RST was to be remunerated in the amount of 0.75 percent of the state operating company's gross sales proceeds. In addition it would receive two percent of the operating company's consolidated profits after certain deductions. RST would also receive an engineering fee of three percent of specified construction costs of

<sup>49</sup> These contracts are described in some detail in M. BOSTOCK AND C. HARVEY, *supra* note 40, at 229

projects and a recruiting fee of 15 percent of the total emoluments payable to expatriate employees during their first year.

Under a separate sales and marketing contract RST was to receive 0.75 percent of the gross sales proceeds of all sales of copper metal throughout the world and 2.5 percent on cobalt sales.

Copper mining in the Congo illustrates the possibilities for using management contracts after a complete nationalization. In 1937 the Congo (now Zaire) Government took over the Belgian-owned Union Minière du Haut Katanga, without compensation. In 1969, however, the government and the Belgian firm reached agreement on compensation and on an arrangement under which the company would provide management assistance on a fee basis.

No standard terms have developed for management contracts. In some, remuneration has been based on sales volume and expenses incurred. Others have turned to a share of profits, with a hope that the managing firm would have an incentive to increase efficiency. Whatever the basis of compensation, the interest of foreign firms in management contracts has generally been limited, unless they have had some equity ownership or another form of access to a significant portion of profits. In most cases where management contracts have been successful, the foreign firm has had a clear and strong interest in the success of the operation. Where the firm's downstream operations depend on inputs from the project it is managing, the conditions may be met.<sup>50</sup> In any case, experience suggests that the host government can face tough administrative problems even with management contracts. For example, there have been numerous cases where the managing enterprise has siphoned profits out of the project managed under contract through purchases from affiliates of materials at prices far above those that would be available elsewhere.

#### PRODUCTION-SHARING, SERVICE, AND WORK CONTRACTS

Some agreements have gone beyond the modern concession format in which the foreign firm holds equity in the facilities. Under some arrangements, the government simply purchases the services of a foreign enterprise which has no ownership interest in the producing company. Service contracts, work contracts, and production-sharing arrangements provide examples of agreements that are sometimes close to this structure.

Some of the most confusing terminology surrounds these three "types" of agreement. In the early 1970's such arrangements were still, as one commentator observed earlier with regard to service contracts, "too new and too few to have developed any very pronounced standardization in name, form, or substance."<sup>51</sup>

<sup>50</sup> For a discussion of management contracts, see P. GABRIEL, *THE INTERNATIONAL TRANSFER OF CORPORATE SKILLS: MANAGEMENT CONTRACTS IN LESS DEVELOPED COUNTRIES* (1967).

<sup>51</sup> E. Murphy, Jr., *Oil Operations in Latin America: The Scope for Private Investment*, 2 INT. LAWYER 455, 471 (1968).

In theory, under all three arrangements the foreign firm is a "contractor," not a concession holder or partner. The investor is a "hired technician" rather than the operator of a subsoil interest. In practice, the line between the conventional concession contract on the one hand and a service, work, or production-sharing contract on the other has been less than sharp. And the boundaries dividing service contracts, work contracts, and production-sharing agreements from each other have often been very blurred indeed.

### *Service and Work Contracts*

Perhaps the most basic content of service and work contracts is illustrated by mineral agreements in Indonesia, negotiated between 1966 and 1973, for copper, nickel, and tin operations. Indonesia adopted the terminology of "work contract" for these arrangements. The essential feature of the contract has been that the title to the ore remained with the government until it was extracted. In other respects, however, the Indonesian work contracts were quite similar to the traditional concession and quite dissimilar to the "service contracts" of the Middle East. For example, the Indonesian "contractor" simply paid a corporate income tax, although sometimes at special rates, on his profits from the sale of the ore.<sup>52</sup> And the ownership of the mining facilities was unambiguously vested in the hands of the foreign firm.

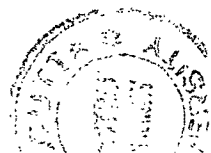
Clearly, more has usually been implied in the terminology of service and work contracts than was evident in the case of the Indonesian agreements for hard minerals. Passing of title is usually, in practice, not much more than a legal nicety.<sup>53</sup> In fact, if no more is meant, many of the traditional concessions in Hispanic law countries would technically qualify, since according to that legal tradition the title to ore bodies resides automatically in the state, although many concession documents in those countries have carefully skirted the issue of title.

The use of the terms service or work contracts usually implies a rather different relationship from that which is understood under typical concession agreements. The foreign firm is considered to be working as a contractor in some sense for the host government. The foreigner's services may be paid for in cash or kind. His remuneration could be based on an annual fixed fee, but he generally receives reimbursement for actual costs plus a payment based on profits.

The 1966 agreement between the National Iranian Oil Company (NIOC) and the French state agency, *Entreprise de Recherches et d'Activités Pétrolières* (ERAP) and ERAP's subsidiary, *Société Française de Pétroles d'Iran* (SOFIRAN), provides a typical model of what is usually understood as a service or work contract. The agreement avoided words of direct grant and described ERAP and SOFIRAN as "contractors." ERAP agreed to provide the risk capital for the exploration and its subsidiary

<sup>52</sup> See, for example, *Contract of Work between Indonesia and Freeport Indonesia, Inc.* (April 7, 1967), Art. 5.

<sup>53</sup> But see note 8, *supra*.



agreed to provide the technical "know-how" and services and to serve as a general contractor. The oil produced was to belong to NIOC, an essential point of the agreement, but sale to ERAP of a percentage of the oil produced was guaranteed at an agreed price. ERAP also agreed to act as a broker and to sell certain quantities of crude oil on behalf of NIOC on the world market. Funds advanced by ERAP for exploration and development were to be repaid after oil was produced in commercial quantities.<sup>54</sup>

As in the ERAP case, most arrangements have called for the foreign firm to bear the risk of exploration. Some agreements have treated development expenditures as an interest bearing loan from the foreign firm to the government which could be repaid in cash or kind. In other arrangements, the company would bear these expenditures entirely on its own account. The only commitment to the company would be that, as contractor, it was guaranteed a certain amount of the production which would have to cover costs and profits.

Arrangements in Bolivia were similar to the NIOC-ERAP agreement, but the terminology was rather different. Under the 1972 Bolivian general law relating to hydrocarbons, Yacimientos Petroliferos Fiscales Bolivianos (Y.P.F.B.), the Bolivian state oil enterprise, was authorized to enter into "operation contracts."<sup>55</sup> Under these agreements, the contractor would initially bear all the costs and risks of exploration and exploitation, but would eventually be compensated for expenses incurred during the exploitation phase should oil be found. All hydrocarbons produced by the operator were to be delivered to Y.P.F.B. Y.P.F.B. retained, at wellhead prices, the volumes necessary for paying national and departmental taxes. Part of the balance was retained by Y.P.F.B. and a portion was to be delivered to the contractor.

The 1972 Bolivian law made provision for "petroleum service contracts" as well as "operation contracts." These "petroleum service contracts" were of a very special nature: they could be entered into by either Y.P.F.B. or an operation contractor to engage a third party to perform a specialized task such as marketing, transport, or refining.

Venezuela also has negotiated agreements that are labelled "service contracts," but with a rather different meaning from Bolivia's "petroleum service contracts." A petroleum service contract for oil in South Lake Maracaibo between Corporacion Venezuela de Petroleo and Shell provides an example. Under this arrangement, the financing was to be provided by Shell, the contractor. After a three-year period, a formula came into operation which would require the contractor to surrender a part of the contract area that is likely to have oil. In the operating period, the contractor would retain 90 percent of the oil, with the remainder going to

<sup>54</sup> Cattan, *Present Trends in Middle Eastern Oil Concessions and Agreements*, in *PRIVATE INVESTORS ABROAD—PROBLEMS AND SOLUTIONS IN INTERNATIONAL BUSINESS* IN 1969, at 140 ff (Cameron ed. 1969); also OECD, *OIL* . . . , *supra* note 41, at 92 ff.

<sup>55</sup> Bolivia: General Laws of Hydrocarbons, 69 MINERAL TRADE NOTES, Nov. 1972, at 14 ff.

the state corporation. Shell would pay to the government a royalty of 16½ percent and an income tax of 60 percent, based on a kind of posted price. The state firm would receive five percent of the royalty going to the government and a portion of Shell's after-tax profit varying from zero to 55 percent when the net profits were more than US \$0.50 per barrel.<sup>58</sup>

As with equity sharing arrangements, the amount of supervision exercised by the government, or a state enterprise, over a contractor has varied from case to case. In many situations government control has been more theoretical than actual. In other cases it has been very real. The problems facing the government that has granted a service contract are akin to those faced by government directors on the board of directors of a venture in which the government shares equity ownership. Without assistance, perhaps from a "technical committee" of the type attempted in the Colombia-Hanna Chevron agreement mentioned above, government representation may generate little influence over decisionmaking.

Actual agreements have differed with regard to the mechanism through which the government is to participate in management. The 1972 Bolivian general law relating to hydrocarbons provided, in the case of an "operation contract," for a "control committee" composed of representatives of Y.P.F.B. That committee was to approve all budgets, programs of work, and methods of operation, and perform audits, among other things. The Venezuelan agreement with Shell provided for joint operating committees. In addition, the state firm had the possibility of exercising influence by taking up an option to purchase 20 percent of the equity in the contracting firm.

### *Production-Sharing Agreements*

Along with service contracts, production-sharing agreements have become popular. The term "production-sharing" agreement could, perhaps, be reserved for arrangements whereby the foreign firm and the government share the output of the operation in predetermined proportions. In practice, the term has been applied to almost any kind of arrangement whereby there is at least an option that the firm and the government receive their benefits in kind rather than in cash. The distinction between service contracts and production-sharing contracts had become one of small technicalities as they had evolved by 1975.

Perhaps the purest examples of production-sharing agreements were the so-called "co-production" agreements that had been negotiated for manufacturing by Western firms in the Communist countries of Eastern Europe. Typically, the Western firm provided licenses, machinery, and technical assistance. In payment, it agreed to accept a certain amount of the product of the firm.

For raw materials in the developing countries, the agreements have generally been more complex, partly as a result of the fact that the foreign investor has contributed more than simply technical know-how and partly because of the greater risk that is usually involved. A number of petro-

<sup>58</sup> OECD, *OIL* . . . , *supra* note 41, at 92.

leum agreements negotiated in Indonesia illustrate "production-sharing" arrangements for raw materials. These agreements are of two distinct types: those reached under the Sukarno regime between 1960 and 1965, and those that emerged in the early Suharto period.

In the years 1960-65, most foreign-owned enterprises in Indonesia were taken over by the government. At the same time, however, the government negotiated a number of "production-sharing" agreements, primarily with the Japanese.<sup>57</sup> Production-sharing was characterized "as the preferred form of foreign investment."<sup>58</sup> The basic theory behind these agreements was that they called for "redeemable fixed interest loans"<sup>59</sup> by the foreign company to the government. The loan would be repaid by the government within a stipulated time in the form of an agreed percentage of the product of the project. Under these arrangements, the foreign investor was generally regarded as a creditor, rather than as a partner or contractor, even though he was responsible for certain services. Principal, interest, and remuneration for technical and marketing cooperation were to be paid to the firm only with a percentage of the annual product valued at world prices. The Indonesians negotiated such production-sharing agreements for timber, oil, nickel, and a number of other commodities.

The change of government in 1965 brought with it corresponding changes in the form of production-sharing contracts. The new agreements bore only superficial resemblance to the production-sharing agreements of the 1960-65 period or to traditional concession contracts. These contracts were negotiated only for petroleum exploration and development; the government adopted different forms of contract for other minerals and for timber.

By early 1971 some 36 foreign companies had negotiated the new style agreements with Pertamina, the state oil company. These agreements were entered into by small and medium-sized firms, as well as by such large international enterprises as Shell, Compagnie Française de Pétroles, Gulf, BP, and Mobil.<sup>60</sup>

Under these arrangements, the foreign companies were "contractors" to Pertamina. Although the terms of the various oil contracts varied in some particulars, the production-sharing contract between P.N. Pertambangan Minyak Nasional (Pertamina) and Phillips Petroleum Company (1968) may be considered typical of the genre. Under the terms of the agreement, Pertamina was responsible for the "management of the operations." Phillips was made responsible to Pertamina for the "execution of operations" and provided all financial and technical assistance required for the

<sup>57</sup> For a full discussion of the agreements negotiated during this period, see Gibson, *Production-Sharing*, 2 BULL. OF INDONESIAN ECONOMIC STUDIES, Feb. 1966, at 52 ff. (Part I) and June 1966, at 75 ff (Part II).

<sup>58</sup> *Id.* pt. I, at 52.

<sup>59</sup> *Id.* pt. I, at 52-54.

<sup>60</sup> Hunter, *Oil Developments*, 7 BULL. OF INDONESIAN ECONOMIC STUDIES, March 1971, at 98. For a thoughtful analysis of post-Sukarno production-sharing contracts, see R. FABRIKANT, note 46 *supra*.

operations. Phillips carried the risk of "operating" costs (which included the costs of exploration and development) and was required to market all of the crude oil produced, if Pertamina so required.

The two key elements of the agreement that distinguish it from the simple "service contract" are that: (1) Phillips was entitled to recover, in the form of oil, operating costs up to an amount equal to 40 percent per calendar year of crude oil produced and (2) of the balance of oil, Pertamina took 65 percent and Phillips received 35 percent. While it was provided that "Phillips shall be subject to the income tax laws of the Republic of Indonesia and shall comply with the requirements of such laws," Pertamina undertook to pay such taxes on behalf of Phillips. Title to Phillips' portion of oil (including the portion to be sold to recover operating costs) passed to Phillips at the point of export. Title to equipment purchased (not leased) by Phillips was vested in Pertamina when the equipment was landed in Indonesia.

Two important pricing provisions were included in the contract. All sales to third parties were to be valued at net realized prices f.o.b. field terminal received by Phillips unless Pertamina found a more favorable market, in which case this market price was to be used. Sales to affiliates were to be valued by using "the weighted average per unit net price f.o.b. field terminal received by Phillips for sales to Third Parties during the preceding three (3) calendar months."<sup>61</sup> Any commissions paid to affiliates in connection with sales to third parties were not to exceed the "customary and prevailing rate."

The pricing provisions gave important protection to the government against the firm's underpricing of oil sold to affiliates. In addition, the fact that Pertamina had the option of taking its share in oil rather than money provided further protection. If the government was not satisfied with the price of sales to affiliates (or to nonaffiliates), it could take payment in crude oil and attempt to sell it to a higher bidder.

In a production-sharing arrangement such as the Pertamina-Phillips Petroleum agreement, the host government must be concerned not only with sales to affiliates. The costs of operations, although limited to 40 percent, must be calculated to determine the amount of oil that goes to each party. The problem was somewhat greater than in the earlier agreements which provided only for the repayment of a predetermined "debt." Slippage in the amount of income accruing to the government could occur in the calculation of these "operating costs" incurred by the company under post-1965 agreements. Such deductions must be given the quality of scrutiny that would be given by a government tax office to deductions from gross income in a traditional concession agreement.

Several production-sharing agreements negotiated in Indonesia after the Phillips Petroleum contract added a new provision requiring the contractor to offer a stated percentage of his "contractual rights and obligations" to

<sup>61</sup> "Affiliate" is defined in Section I, subsect. 1.2.14. It is noteworthy that the earlier (1966) Production-Sharing Contract between P.N. Pertamina Minjak Nasional and Kyushu Oil Co., Ltd. makes no reference to affiliates.

an Indonesian participant as soon as commercial sales were made.<sup>62</sup> Depending on the particular contract, the local participants could be either individuals, corporations, or state entities. Typically, the portion required to be offered to Indonesian participants was either five or ten percent.

It is not surprising that most of the production-sharing agreements have been in the oil industry. For the arrangements to be of significant benefit to the host country, the government must be able to sell domestically or on foreign markets a share of the output of the extractive operation. This has been possible for oil as was effectively demonstrated in 1973, as oil-producing countries made the most of their "participation oil." For many other minerals, sales of large quantities on spot markets can not be arranged so smoothly.

The government must depend on the foreign firm to sell to affiliates and to arrange long-term sales contracts with other firms in the industry. In fact, even oil agreements usually make some provision for the company to take the government's share of the oil. At times, the cost to the company can be high. In August 1973, Occidental had to buy back Libya's share at \$4.90 per barrel, a price that appeared at the time to be high, at 32¢ above the posted price.<sup>63</sup> Soon thereafter, the price structure had changed in such a way that most producing countries were selling on the open market some of the participation oil that had previously been sold through the companies' marketing channels.

There have been signs that the changes in structure of other minerals industries may increase the attractiveness of production-sharing in those industries. The nationalizations of copper operations in the late 1960's and early 1970's have shown that host countries can sell their own copper.<sup>64</sup> With more open markets the production-sharing model may have something to offer governments. For example, the 1970 OMRD Ecuadorian copper agreement called for the government to take its royalty payments in the form of ore, if it so chose.<sup>65</sup> Some other industries show similar possibilities. A 1974 agreement between Niger, Continental Oil Co. and CEA, the French Atomic Energy Commission, gives the government the right to market its share of uranium produced.<sup>66</sup>

<sup>62</sup> See the Arco contract of August 9, 1971 and the Indonesian Offshore contract of March 3, 1972, for example. Both are reproduced in R. FABRIKANT, *OIL DISCOVERY AND TECHNICAL CHANGE IN SOUTHEAST ASIA—THE INDONESIAN PETROLEUM INDUSTRY: MISCELLANEOUS SOURCE MATERIAL* (Singapore: Institute of Southeast Asian Studies, 1973. Field Report Ser. No. 4).

<sup>63</sup> Smith, *Libya Intensifies Oil Restrictions*, N.Y. Times, Aug. 14, 1973, at 43.

<sup>64</sup> See R. Vernon, *SOVEREIGNTY AT BAY: THE MULTINATIONAL SPREAD OF U.S. ENTERPRISE* 41-43 (1971). The ability of Chile to sell copper was, of course, subject to attempts by the companies whose properties were nationalized to block sales of Chilean copper shipments through court action.

<sup>65</sup> In mid-1973 Ecuador signed a new agreement with Texas-Gulf Consortium providing for the right of Ecuador to purchase up to 51% of the company's total production for its own merchandising. See *New Oil Contract Signed by Ecuador and Consortium*, N.Y. Times, Aug. 8, 1973, at 47.

<sup>66</sup> *Uranium—Niger*, 71 MINERAL TRADE NOTES, May 1974, at 12.



## THE FUTURE OF THE NEW STRUCTURES

The 1960's brought major innovations in the forms of mineral agreements. Most important, the new structures have broken the tight link between ownership, control, and financial risks and benefits that was inherent in the traditional concession. Arrangements have been negotiated which have repackaged these elements in ways that were not feasible under the old structures.

Because ownership and control have become important political symbols in most developing countries, new contractual forms have been created to allow greater freedom in allocating ownership, control, and financial risks and benefits in ways that satisfy both the new political and economic imperatives. Where a foreign firm is considered important for its financial, technological, or marketing contributions, the new structures permit the negotiation of agreements that allocate control and financial benefits in ways that reflect the bargaining powers of the parties. Ownership can be allocated in a way that makes the presence of the foreign firm politically acceptable in the host country.<sup>67</sup>

In some cases, ownership has had symbolic or real meaning for the foreign firm as well as for the host government. In many cases, extractive firms have resisted arrangements that would leave them with less nominal ownership than that to which they have become accustomed, even though the financial and control aspects of the proposed agreements might be perfectly satisfactory. In some cases, the problems facing the private managers considering innovative arrangements have been real. They have worried about how to explain the new structures to shareholders, how to set up insurance against expropriation and other risks on assets which they do not own, or how to raise loans on property to which they do not have title. In many cases, however, resistance from management seems to have been based less on economic and legal grounds than on the symbolic meaning of ownership.

Increasingly, managers have recognized that financial benefits—their principal objective—need not be completely linked with control. And control need not be linked at all with ownership.

The new forms of agreement will almost certainly spread to a number of industries where they have not been common. In some cases, the new arrangements will not generate significant shifts in the allocation of finan-

<sup>67</sup> For a strong argument in favor of wide use of service and management contracts, see T. H. MORAN, *THE IMPACT OF U.S. DIRECT INVESTMENT ON LATIN-AMERICAN RELATIONS* (prepared for the Commission on U.S.—Latin-American Relations, Washington, June 1974). An interesting study of minerals investment in Australia found a strong relationship between the benefits to Australia and the bargaining variables discussed in the first Chapter of our forthcoming book. However, ownership appeared to be unrelated to the determinants of bargaining power. Apparently, Australia had not attached great significance to equity holdings, but had concentrated on the economic returns. See R. McKern, *Multinational Enterprise and Natural Resources: A Study of Foreign Direct Investment in the Australian Minerals Industry*, Feb. 1972 (unpublished doctoral dissertation, Harvard Business School).

cial benefits. But in industries in which bargaining powers continue to shift in favor of the host country and where host country negotiating skills are sufficient, the changes will be more than political. There will be real changes in who controls the operations and who receives the financial benefits from the projects.

Yet, while the new forms of agreement have provided ways of sharing symbolic power and economic benefits in ways that the traditional concession could not, they have not eliminated the complex technical problems relating to the allocation of financial benefits and financial risks. The technical issues remain no matter what the structure of the agreement.

It appears that many of the innovations for minerals typically governed by traditional arrangements come from firms which have had experience in other industries. Petroleum firms, in their efforts to diversify, are expressing a willingness to transfer the structures of petroleum agreements to hard mineral operations such as copper. They have learned that some of the ways of repackaging ownership, control, and financial issues are feasible and acceptable to management. The concept of "ownership" has lost some of its significance for managers of companies that have had experience with arrangements in which the company has had sufficient control over critical decisions and has received attractive financial benefits with little direct claim to ownership.

## THE TWENTY-SIXTH SESSION OF THE INTERNATIONAL LAW COMMISSION

*By Richard D. Kearney \**

The International Law Commission celebrated the twenty-fifth anniversary of the opening of its first session on May 27, 1974—a little behind the historical course of events, for the first session had actually opened on April 12, 1949. As was to be expected, the occasion called forth almost a flood-tide of oratory recounting the achievements of the Commission in the codification of international law.

Although two or three of the speakers referred to the importance of imparting a degree of deliberate speed into the Commission's progress in codifying the law, no one at this one thousand two hundred and sixty-fifth meeting of the Commission alluded to the slightly ironic fact that the two subjects selected for priority attention during the twenty-sixth session were both included in the original list of "further points" selected for codification at the Commission's sixth meeting on April 20, 1949:

2. Succession of States and Governments

13. State responsibility<sup>1</sup>

It may be doubted that the members of the Commission who adopted the list of topics could have anticipated that a quarter of a century later the Commission would be engaged in the codification of two subjects on the initial list.<sup>2</sup> While various conclusions may be drawn from this circumstance, a fundamental one is that a considerable amount of seasoning, in the lumberman's not the chef's use of the term, can be needed before a major international topic is ready for codification.

### STATE SUCCESSION

In 1949, the subject of state succession was clearly not ripe for reduction to black letter rules. The process of decolonization, which has been the predominant feature of international life in the third quarter of the 20th century, was just beginning. The experience of the fifty-eight states which comprised the United Nations in 1949 could not have provided a foundation secure enough to support rules of succession for the some eighty states that have since joined the international community.

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<sup>1</sup> [1949] YB ILC 177. In the process of codification, "Succession of States and Governments" has become two topics, with the "Governments" eliminated: "Succession of States in Respect of Treaties" and "Succession of States in Respect of Matters Other Than Treaties."

<sup>2</sup> The Commission has submitted final reports on eighteen topics but has codified only seven on the original list.

This population explosion of international persons could not be dealt with solely on the basis of past custom. Its legal consequences had to be determined with due regard to its own dynamics. As the Commission put it in the introduction to its 1973 draft articles on succession of states in respect of treaties:

It is in the nature of things that more recent practices must be accorded a certain priority as evidence of the *opinio juris* of today, especially when, as in the case of succession of States in respect of treaties, the very frequency and extensiveness of the modern practice tends to submerge the earlier precedents.<sup>3</sup>

Recognition of this recent practice by the Commission resulted in widespread approval of the basic propositions underlying the 1972 draft articles both in the 1972 session of the General Assembly and in the comments submitted by governments. These basic positions are that succession of states to treaties should be treated as a part of the law of treaties and thus aligned as closely as possible with the Vienna Convention on the Law of Treaties; that a newly independent state has a broad freedom of choice with respect to maintenance in effect of treaty rights and obligations applicable prior to independence to what is now its territory; and that treaty rights and obligations continue in force when states unite or a state divides. None of the principles, of course, is absolute.<sup>4</sup>

Sweden was the only state to submit a major criticism of the draft as a whole—that the “clean slate doctrine” for newly independent states was not sufficiently supported by practice or principle and might be replaced by a system under which the new state would remain bound by treaties concluded by the predecessor state but with extensive rights to denounce undesirable treaties. In opposing this proposal Sir Francis Vallat, who had replaced Sir Humphrey Waldock as Special Rapporteur for the subject, advanced the view that the proposed modification would be a major reversal of a principle that had general support.<sup>5</sup>

Endre Ustor, current President of the Commission, in presenting the report of the twenty-sixth session to the General Assembly, expressed the thesis underlying the “clean slate doctrine” as follows:

... It can be presumed, as a general rule, that the population of a territory in a colonial status is normally not in a position to play a part in the actual government of the metropolitan power and cannot, therefore, be regarded as responsible for the conclusion of treaties, and, therefore, it cannot be bound by treaties to which it has not consented.<sup>6</sup>

However, legal metaphors, like Monet paintings, convey an overall effect

<sup>3</sup> ILC Report, 24th Sess. (1972), GAOR, 27th Sess., Supp. 10, at 5 (1972). UN Doc. A/8710/Rev. 1 [hereinafter ILC 24th Report].

<sup>4</sup> For a further discussion of the 1972 draft articles, see Kearney, *The Twenty-Fourth Session of the International Law Commission*, 67 AJIL 92-98 (1973). The present discussion will concentrate on substantial changes made by the Commission to the 1972 draft and major proposals for change that were not accepted.

<sup>5</sup> Vallat (*First*) Report on Succession of States in Respect of Treaties, UN Doc. A/CN.4/278, at 16 (1974) [hereinafter 1st Vallat Report].

<sup>6</sup> UN Doc. A/C.6/SR.1484, at 9 (1974).

of light within which lies a considerable complexity. While one can contemplate that newly independent states, like infants, come naked into the world, both are born into special sets of relationships.

The point is illustrated by Articles 11 and 12 of the 1974 draft dealing with boundary and other territorial regimes. The substance of these articles had been contained in Articles 29 and 30 of the 1972 draft: that succession as such does not affect (a) a boundary or obligations and rights relating to the regime of a boundary established by a treaty or (b) obligations or restrictions upon the use of territory established by a treaty for the benefit of any territory of a foreign state. The principle expressed in Articles 29 and 30 had been strongly attacked by some delegations in the debate on the 1972 draft in the twenty-seventh session of the General Assembly.

Certain representatives considered that, in spite of the Commission's efforts, articles 29 and 30 . . . cut across fundamental principles of modern international law, such as the principles of self-determination, of sovereign equality of states and of permanent sovereignty of states over their natural resources.<sup>7</sup>

Behind these appeals to fundamental principles quite often lay the fact that former colonial administering powers entered into treaties defining boundaries or establishing territorial regimes that were adverse to the interests of a particular dependent territory at times for economic advantage or to benefit another dependent territory or as part of a general political settlement. To rectify these and other asserted past injustices, the argument was made that the "clean slate doctrine" should be given an absolute character. The newly independent state should not be subject to any limitations based upon or deriving from a treaty.

Although these proposals represented a minority position, the force with which they were advanced caused the Commission to review Articles 29 and 30 with great care. The result was renewed conviction that the exclusion of boundary and territorial regimes established by treaty from the effects of succession reflected custom as established by the practice of states. The Commission also recognized that a number of the states opposing the two articles had expressed concern that their adoption might prejudice the position of a state which, in addition to inheriting a boundary, had also inherited a reasonable case for challenging that boundary on the basis of the invalidity of the treaty establishing the boundary.<sup>8</sup> A case of this nature should fall to be settled under the law of treaties and not under the law of succession. While many members of the Commission believed that this distinction was so obvious as not to require saying, in order to meet the

<sup>7</sup> UN Doc. A/8892, *Report of the Sixth Committee* 15 (1972).

<sup>8</sup> The Commission's commentary to Articles 11 and 12 discusses a number of existing disputes in which such claims have been raised. These include the Anglo-Ethiopian Treaty of 1897 and the later treaties affecting the Somali-Ethiopian border; the Anglo-Belgian bases agreements of 1921 and 1951 under which central African territories administered by Belgium were granted transit rights and leases in perpetuity of port sites in Tanganyika; and the Berlin Act of 1885 regarding navigation on Congo and Niger Rivers. ILC *Report*, 26th Sess. (1974), UN Doc. A/9610, Vol. I, at 106-08; 113-14; 120-21 [hereinafter ILC 26th *Report*].

expressed anxiety a new article was drafted to the effect that nothing in the articles should "... be considered as prejudicing in any respect any question relating to the validity of a treaty."<sup>9</sup> A few needed clarifications were made to Articles 29 and 30 and, to emphasize their nature, all three articles were moved into Part I, which contains "General Provisions."<sup>10</sup>

Whether this effort will allay concern is doubtful. For example, in the discussion of the revised articles in the Sixth Committee, the representative of Afghanistan expressed doubt that states which considered themselves adversely affected by Articles 11 and 12 would agree to be bound by the treaty and, if that were the case, then the articles would be without a purpose.<sup>11</sup> The representative of Tanzania reiterated that territorial treaties should be dealt with in exactly the same manner as any others.<sup>12</sup> The assaults in 1974, however, were fewer than in 1972.

An unfortunate offshoot of the clean slate metaphor is the implication that a newly independent state comes into existence without any international legal relationships of a consensual character. An accurate, though less evocative, shorthand description of the draft articles on newly independent states would be the "free choice doctrine." The core element in the concept is that:

... a consent to be bound given by the predecessor State in relation to a territory prior to the succession of States establishes a legal nexus between the territory and the treaty and that to this nexus certain legal incidents attach.<sup>13</sup>

The nature of this bond, and its consequences in the case of newly independent states, has to be determined in the context of treaty law as it has developed under the Charter of the United Nations and in particular the principles of "self-determination of peoples" and "sovereign equality."

Examination of international practice since 1945 led the Commission to the view that the effect of these principles upon the nexus was to afford the newly independent state a very broad freedom of action either to maintain preexisting treaty relationships in effect or to terminate them. This conclusion merely endorsed what had been accepted practice of considerable antiquity, dating back at least to the position taken by the United States regarding British treaties following the Revolution<sup>14</sup> The manner in which the freedom may be exercised has been the focus of current inquiry.

The Commission's 1972 solution with respect to multilateral treaties previously applicable to the newly independent territories was that, on the basis of the nexus newly independent states had a right to become parties by a notification of succession which would have effect as from the date of

<sup>9</sup> *Id.* at 126.

<sup>10</sup> As previously noted Article 29 became Article 11 and 30 became 12. The new article became Article 13.

<sup>11</sup> UN Doc. A/C.6/SR.1496, at 10 (1974).

<sup>12</sup> *Id.* at 11.

<sup>13</sup> ILC 26th Report 21.

<sup>14</sup> 2 O'CONNELL, STATE SUCCESSION IN MUNICIPAL LAW AND INTERNATIONAL LAW 91 (1967).

succession.<sup>15</sup> In the absence of a notification the treaty would not apply to the newly independent state. Bilateral treaties would require the express agreement of both parties or conduct giving rise to a presumption of agreement. The effective date would be the date of succession "... unless a different intention appears from their agreement or is otherwise established."<sup>16</sup>

This method of giving effect to the principal of freedom of choice was supported almost without exception in the General Assembly and the comments of states. Only three areas gave rise to substantial proposals for change. A number of states were concerned that the option given the newly independent state with regard to notifying succession to multilateral treaties could adversely affect the interests of the new state and of the international community in the case of multilateral lawmaking treaties concluded under the auspices of the United Nations. There were proposals that such lawmaking treaties should be automatically applicable to all new states and that newly independent states should be given the right of opting out of such treaties rather than that of opting in.<sup>17</sup>

The Commission decided to adhere to its original position that there was no legitimate reason for requiring that a newly independent state be bound contractually by a general multilateral treaty "... any more than any other existing State which has not chosen to become a party thereto."<sup>18</sup> There was considerable discussion of the Geneva Conventions of 1949 for the Protection of War Victims as examples of treaties to which there should be automatic succession but, as the Commission's report points out, neither state practice nor depositary practice affords a sound basis for adopting a rule of continuity limited to general humanitarian conventions.<sup>19</sup>

At a late date in the session, Professor Ushakov proposed the addition of an article under which "multilateral treaties of a universal character" would remain in force between the newly independent state and the other parties thereto until the new state had given notice of termination. A multilateral treaty of a universal character was defined as "... an international agreement which is by object and purpose of world-wide scale, open to participation by all States . . ." An accompanying comment listed "the humanitarian conventions, the ILO conventions, the Covenant on Human Rights, the Universal Postal Convention and the like, the treaty banning nuclear weapon tests, the treaty on non-proliferation of nuclear weapons,

<sup>15</sup> ILC 24th Report 33, 46, 48. If the newly independent state's participation would be incompatible with the object and purpose of the treaty or consent of all the parties to participation of another state would be required either by the terms of the treaty or as a result of the limited number of negotiating states and its object and purposes, the consent of all other parties would be required to make the notification effective. *Id.* at 33.

<sup>16</sup> *Id.* at 51.

<sup>17</sup> 1st Vallat Report, Add. 2, *supra*, note 5, at 28 *et seq.* The opting out approach is that supported by the International Law Association. See the resolution adopted at the Buenos Aires Conference in I.L.A. Report of the Fifty-Third Conference 596 (1968).

<sup>18</sup> ILC 26th Report 140.

<sup>19</sup> *Id.* at 141.

the treaty on the peaceful uses of outer space and so on . . ." as examples of the kinds of agreement that would be covered by the proposal. The Commission decided that, because of the limited time available, it could not deal with the proposal but would refer to it in its report to the General Assembly.<sup>20</sup>

When the Sixth Committee debated the draft articles, the proposed article was supported principally by the Communist states. The former dependent territories that addressed the issue in specific terms were almost unanimous in opposition. A number of participants suggested either that the matter should be left to a diplomatic conference or that it required further study.<sup>21</sup>

In commenting on the 1972 draft the Governments of Poland, Sweden, and the United States expressed concern regarding the dating of a notification of succession back to the date of succession. As the Swedish Government posed the problem:

. . . Where a newly independent State makes a notification of succession some considerable time after independence, other States may, in good faith, have acted in the meantime on the assumption that the treaty was not applicable between them and the newly independent State. Should the newly independent State insist upon the date of independence as the effective date, the other States would presumably not be open to allegations of breach for having failed to apply the treaty in the meantime.<sup>22</sup>

One possible remedy that was suggested was the institution of a time period within which the newly independent state would be required to make a notification of succession. A double-barrelled objection shot down this effort. The time period would have to be relatively brief in order to limit the likelihood of third states' taking positions dissonant with treaty requirements. On the other hand, practice over the last twenty-five years had established that many newly independent states needed substantial periods to determine what multilateral treaties they wished to keep in force. The situation is often further complicated by the fact that the press of events will often require inadequately manned legal offices to put aside the studies needed for decisions on treaties.

The solution adopted by the Commission was to maintain the principle of continuity by providing that the newly independent state is to be considered as a party to the treaty from the date of succession but to suspend the operation of the treaty as between the new state and the other parties until the date of the notification of succession. However, the treaty may be applied provisionally as between the new state and any other party which agrees, or by conduct is considered to have agreed, to earlier ap-

<sup>20</sup> *Id.* at 33-35.

<sup>21</sup> UN Docs. A/C.6/SR.1486-95 (1974). For examples see Bulgaria, German Democratic Republic, and Jordan in support, 1495, at 9; 1486, at 15; 1492, at 21; Austria, Iraq, Jamaica, Morocco, and Pakistan opposed: 1490, at 5; 1495, at 5; 1495, at 6; 1492, at 16; 1492, at 22.

<sup>22</sup> UN Doc. A/CN.4/275, at 18 (1974).



plication under Article 26.<sup>23</sup> The solution is a reasonable disposition of a somewhat intractable question. It does not dispose clearly of all the questions that may arise, such as the initial date for the running of time periods specified as a prerequisite for the enjoyment of rights under a treaty. In the debate in the Commission, some questions were raised as to the interaction of Article 22 with provisions of the Vienna Convention on the Law of Treaties. An example is the definition of party in Article 2(1)(g) of the Vienna Convention as a state "... for which the treaty is in force."<sup>24</sup>

The 1972 articles contained a restriction upon succession to a multilateral treaty "... if the object and purpose of the treaty are incompatible with the participation of the successor State in the treaty."<sup>25</sup> In the Sixth Committee debate, the Spanish delegate suggested that a succession to a treaty which radically changed the conditions for the operation of the treaty should not be permitted.<sup>26</sup>

The Commission decided to add this requirement to its original limitation in Article 16(2) as well as in other articles which raised the same issue, such as participation in multilateral treaties not in force at the date of the succession of states (Art. 17), or which had been signed by the predecessor state subject to ratification, acceptance, or approval (Art. 18), and on the provisional application of multilateral treaties (Art. 22) in which both requirements were inserted as a new paragraph.

The addition of this version of a truncated *rebus sic stantibus* clause was accepted by the Commission without much debate, as it had appeared in the 1972 draft as a requirement, in addition to the compatibility test, for succession to multilateral treaties with respect to the entire territory of a newly independent state formed from two or more territories (former Art. 25) or from the territory of two or more states (former Art. 26) and to cases of the dissolution or separation of states (former Arts. 27 and 28). It did, however, reinforce the concern expressed by some members regarding the consequences of the limitations. If a party to a multilateral treaty objects to a notification of succession on the ground that participation by the new state would be incompatible with the object and purpose of the treaty or that it would radically change the conditions for the operation of the treaty, what would be the effect of that objection? There are a number of possibilities among which are:

- (a) the new state would be barred from succession;
- (b) the new state would become a party but there would be no treaty relationship between it and the objecting state;

<sup>23</sup> ILC 26th Report, 194-201; 223-26. It should be noted that Article 22(2) is somewhat less restrictive, at least verbally, than Article 26, as it permits provisional application "in accordance with Article 26 or as may be otherwise agreed" while Article 26 refers to express agreement.

<sup>24</sup> UN Doc. A/CONF.39/27 (1969); 63 AJIL 875 (1969); 8 ILM 684 (1969).

<sup>25</sup> ILC 24th Report 33.

<sup>26</sup> 1st Vallat Report, Add. 2, *supra* note 5, at 44.

(c) the objection would become moot unless supported by some or all of the other parties;

(d) the objection would prevail unless opposed by some or all of the other parties.

There is no easy solution to the problem. A party to the treaty should not by mere objection be able to prevent a new state from relying upon the legal nexus arising from prior application of the treaty to its territory. On the other hand, a succession should not be permitted to change radically the conditions for the operation of a treaty. In his report, the Special Rapporteur recommended against introducing a system of objections into the articles but added significantly:

Unfortunately, if that advice is accepted, it will not solve the fundamental problem of any differences that may arise in the application of any of those paragraphs. In these circumstances, in the view of the Special Rapporteur, the sensible course would be to seek suitable means for settling any differences which may arise . . .<sup>27</sup>

The Commission, not without some individual expression of misgivings, followed the advice of the Special Rapporteur on the first point. It did not follow his advice on incorporating a suitable means of settling disputes. The writer submitted a draft article embodying the conciliation provisions of the Treaties Convention as being the logical disputes-settlement provision to include in a draft modelled in large part on that Convention. Despite considerable support for the proposal, a decision was reached to refer the matter to the General Assembly with the following statement:

The Commission is willing, if this should be the wish of the General Assembly, to consider the question of the settlement of disputes for the purposes of the present articles at its next session and to prepare a report for the General Assembly so that it may be available to Governments if and when the articles are being prepared at a conference or in the General Assembly for inclusion in a convention.<sup>28</sup>

This proposal received a certain amount of support in the Sixth Committee in the discussion of the Commission's 1974 report, while other representatives indicated a preference for consideration of the issue at any conference held to consider the draft articles. The General Assembly resolution on the Work of the International Law Commission requested states to include their views on disputes-settlement, as well as on "multilateral treaties of a universal character" in their comments on the draft articles.<sup>29</sup>

While a disputes-settlement procedure is an essential addition to the draft, in view of the problems of interpretation raised by some of the articles, the absence of any criteria to determine the effect of an objection to a notification of succession leaves a gaping hole to be filled in by the dispute settlers. It might be noted that, when dealing with the problems of the new state's action in respect of the predecessor state's reservations to a treaty in Article 19, the Commission made the pertinent rules of the Treaties

<sup>27</sup> *Id.* at 47.

<sup>28</sup> ILC 26th Report 38.

<sup>29</sup> GA Res. 3315 (XXIX), Dec. 14, 1974.

Convention applicable.<sup>30</sup> While application of these rules is not without difficulty,<sup>31</sup> at least they provide a frame of reference within which a disputes-settlement mechanism might operate.

Extensive reconstruction of the 1972 articles on the uniting and separating of states was carried out. Pressure of time in the session of that year had prevented the Commission from giving the articles on these aspects of state change the thoroughgoing study that had been devoted to succession of newly independent states. Thus it was necessary to add articles on the effects of a uniting or separation of states with respect to participation in treaties not in force at the date of the succession as well as in treaties signed by the predecessor state subject to ratification, acceptance, or approval (1974 Arts. 31, 32, 35, 36).<sup>32</sup>

The 1972 draft on effects of a uniting of states had established the principle of the continuity of treaties upon the succession in respect to the part of the territory of the new state to which the treaties had previously been applicable, subject to the limitations of incompatibility with object and purpose or a radical change in the conditions of operation of the treaty. However the new state could extend a multilateral treaty to its entire territory by notification to the other parties (1972 Art. 26).<sup>33</sup> The only substantive change made in the article is the imposition of the compatibility and radical change in conditions limitation on the facility to extend application to the entire territory (1974 Art. 30(3)).<sup>34</sup>

The provisions on separation and on dissolution of states put forward in 1972 had provoked a number of critical comments. The general rule adopted for a dissolved state was that in the parts of its territory that become "individual States," treaties previously in force for the predecessor state continued in force for the "individual States" unless "the State concerned" agreed otherwise or the incompatibility or radical change in conditions for operation rules applied (1972 Art. 27).<sup>35</sup> This principle of continuity was also applied to a state part of the territory of which separated to become an individual state, subject to the same limitations. The new state resulting from the separation, however, was considered as "... being in the same position as a newly independent State. . ." It, thus, had freedom of choice with respect to multilateral treaties and freedom to agree to the continuance in effect of bilateral treaties."<sup>36</sup> The criticism of the articles was directed to whether a sufficient distinction existed between the dissolution of a state and the separation of a part or parts of a state to support the application of the principle of continuity as to the former and freedom of choice as to the latter. A corollary to this concern was

<sup>30</sup> ILC 26th Report 165 *et seq.*

<sup>31</sup> Kearney and Dalton, *The Treaty on Treaties*, 64 AJIL 511-13 (1970).

<sup>32</sup> ILC 26th Report 244-45, 280, 281.

<sup>33</sup> ILC 24th Report 65. In this case, as is the case throughout the draft articles, notification of succession to a restricted multilateral treaty requires the consent of all other parties.

<sup>34</sup> ILC 26th Report 243.

<sup>35</sup> ILC 24th Report 71.

<sup>36</sup> *Id.* at 74.

whether, in practice, it would be feasible to distinguish between cases of dissolution and cases of separation.<sup>37</sup>

In his review of these two articles, the Special Rapporteur remarked:

Unfortunately, the precedents are few and the arguments based on principles of international law, including those relating to treaties, are far from conclusive. In both categories of cases, one may argue from the principle of self-determination as applied to a new State and from the need to maintain the stability and continuity of treaty relations.<sup>38</sup>

Restudy of the 1972 articles by the Commission led to the conclusion that in dealing with dissolution of states it had approached the problem from the traditional concept of a union of States "... which implied that the component parts of the union retained a measure of individual identity during the existence of the union."<sup>39</sup> Classical examples are the union of Norway and Sweden and their separation in 1905 and the association between Denmark and Iceland between 1918 and 1944. The 1972 Article 27, however, applied to all types of dissolution, that is, every case in which the original state no longer remained in existence. A distinction based on this criterion changed the aim of inquiry to the circumstances under which the original state remained in existence. No really satisfactory tests for answering the question were discovered. Would retention of the name and some part of the territory of the dissolved state suffice? The dissolution of the Austro-Hungarian Empire with its dual monarchy illustrates the obstacles to clear conclusions. While Austria adopted the position that as a new state it was not bound by the treaties of the empire, Hungary took the position that they remained in effect.<sup>40</sup>

The Commission abandoned the distinction between dissolution and separation as a theoretical one that did not contribute to a solution of the problem and decided to treat dissolutions as one aspect of the separation of states. The principal issue was then to find a proper balance between continuity and freedom of choice in what would be legally complicated, politically dominated, and highly unpredictable situations. The consequence is a rule that says when a part or parts of a state separate, whether or not the predecessor state continues to exist, treaties in force for the entire territory continue in force for each successor state subject to the standard set of qualifications. A further qualification is added, however: "Notwithstanding paragraph 1, if a part of the territory of a State separates from it and becomes a State in circumstances which are essentially of the same character as those existing in the case of the formation of a newly-independent State, the successor State shall be regarded for the purposes of the present article in all respects as a newly-independent State" (Art. 33). In an effort to clarify the situation further, when a part continues to exist as the prede-

<sup>37</sup> The Belgian, Finnish, and Zambian delegations in the Sixth Committee, and the Governments of Czechoslovakia, the German Democratic Republic, the Netherlands, and the United States in written comments, expressed concern on one or both aspects of the problem.

<sup>38</sup> *1st Vallat Report*, Add. 5, *supra* note 5, at 18.

<sup>39</sup> ILC 26th Report 276.

<sup>40</sup> *Id.* at 265, 266.

cessor state, Article 34 provides for a rule of continuity for that part, again subject to the standard set of qualifications.<sup>41</sup>

The commentary states a limitation on the new qualifications, which may not be clearly apparent from the text. The separating part may be treated as a newly independent state only if the predecessor state continues in existence.<sup>42</sup> Otherwise the principle of continuity would apply.

The solution does not dispose of all the problems in the 1972 proposals on dissolution and separation. It raises one very large new one. What are the circumstances that exist in case of the formation of a newly independent state? The definition of a "newly independent state" in Article 2 sets forth the single test that prior to independence this type of successor state "... was a dependent territory for the international relations of which the predecessor State was responsible."<sup>43</sup> The starting point then becomes the circumstances that make a territory "dependent." The commentary to Articles 33 and 34 discusses at length historical and contemporaneous examples of the separation of states without appreciable clarification of the issue. Previous colonial, trust, or protected territories emerge as accepted examples of dependencies.<sup>44</sup> In discussing pre-World War II examples of parts of a state separating, "secession" is used as descriptive of the process that now results in newly independent states. Finland and the Irish Free State are cited as examples. In the post-World War II era Pakistan is cited as an example of a separation that resulted in a newly independent state and Singapore is noted as having adopted the position of a newly independent state after its separation from Malaysia in 1965.<sup>45</sup> The most recent case of separation is that of Bangladesh from Pakistan. Was this a separation under circumstances existing in the formation of a newly independent state? Was East Pakistan in reality a dependent territory vis-à-vis West Pakistan? In the light of this example should the Commission's proposed test be expanded or would this merely add complexity without compensating clarity?

One other addition to the 1972 draft merits comment. Article 7 on non-retroactivity is an adaptation of Article 4 of the Treaties Convention which makes that Convention applicable only to a treaty concluded subsequent to the entry into force of the Convention by states party to the Convention.<sup>46</sup> Article 7 limits application of the articles to "... a succession of States which has occurred after the entry into force of these articles except as may be otherwise agreed."<sup>47</sup> The utility of the article was the subject of substantial differences within the Commission. It was put forward to make clear that Article 6, which limits application of the articles to the "... effects of a succession of States occurring in conformity with international law and, in particular, the principles of international law embodied in the Charter,"<sup>48</sup> did not extend to territorial transfers in the bad old days before adoption of the Charter. The necessity for Article 6 had been

<sup>41</sup> *Id.* at 262-63.

<sup>43</sup> *Id.* at 41.

<sup>45</sup> *Id.* at 271-74.

<sup>47</sup> ILC 26th Report 59.

<sup>42</sup> *Id.* at 279.

<sup>44</sup> *Id.* at 277.

<sup>46</sup> *Supra* note 24.

<sup>48</sup> *Id.* at 57.

disputed in 1972 on the ground that it was self-evident. The thesis that illegal transfers of territory could not be tolerated in any form had generated sufficient support for inclusion of Article 6 in the 1972 draft.<sup>49</sup>

One possible effect of Article 7 is to deprive a new state that has come into existence before entry into force of the articles from making use of such procedural provisions as notification of succession to multilateral treaties, withdrawal of reservations, and provisional application, even though it may become a party to the articles. A quite substantial proportion of the Commission urged deletion of the article on this basis as well as on the ground that any problems regarding retroactivity could be dealt with adequately under Article 28 of the Treaties Convention.<sup>50</sup>

#### STATE RESPONSIBILITY

In 1973 the Commission completed six draft articles on state responsibility, the first four of which made up a Chapter I on General Principles. The other two were the beginning of a series of nine articles proposed by the Special Rapporteur, Professor Ago, on the rules which should govern the attribution of conduct to a state as a basis for the possible imposition of liability. These two articles provide that the conduct of any state organ, acting in that capacity, is an act of the state under international law if the organ has that status under the internal law of the state and that the nature or status of the organ in the organization of the state is immaterial.<sup>51</sup>

During its twenty-sixth session the Commission adopted three additional draft articles. This represents rather modest progress but the content of the articles engendered lengthy debate and the proposals of the Special Rapporteur underwent rather extensive revisions in the process of adoption.

Mr. Ago had proposed an Article 7 which made the conduct of a person or group of persons an act of the state if, under the internal order of the state, the person or persons had had "... the character of an organ of a public corporation or other autonomous public institution or of a territorial public entity..." The same consequence was ascribed in proposed Article 8 to the conduct of a person or group of persons "... who, under the internal law of the State, do not formally possess the status of organs of that State or of a public institution separate from the State, but in part perform public functions or in fact act on behalf of the State..."<sup>52</sup>

The discussion of proposed Article 7 in the Commission revolved mainly around the consequences of the acts of organs of "a public corporation or other autonomous public institution." There was relative unanimity that the act of an organ of any kind of territorial government could entail state responsibility and that existing practice fully supported this conclusion.<sup>53</sup> The one issue that provoked comments was the status of federal states, and

<sup>49</sup> Kearney *supra* note 4, at 93.

<sup>50</sup> ILC 26th Report 59, 60.

<sup>51</sup> ILC Report, 25th Sess., (1973), GAOR, 28th Sess. Supp. 10, at 29, 32 (1973), UN Doc. A/9010/Rev. 1.

<sup>52</sup> Ago, *Third Report on State Responsibility*, UN Doc. A/CN.4/246/Add. 2, at 81; Add. 3, at 12 (1972) [hereinafter *3rd Report, Responsibility*].

<sup>53</sup> ILC 26th Report 309-12.

particularly those in which the units of the federation had retained some element of international personality. Some support for the provision to deal with such cases was expressed but the Commission concluded that special treatment was unnecessary.

... The purpose of the present article is simply to determine whether, under international law, the conduct of organs of territorial governmental entities of a State—be it federal or unitary—should be regarded as acts of the State: assuming, of course, that those organs have acted in a sphere in which their action may come up against the existence of international obligations of the State in question. Where an organ of a component state of a federal State acts in a sphere in which the component state has international obligations that are incumbent on it and not on the federal State, that component state clearly emerges at the international level, as a subject of international law separate from the federal State, and not merely as a territorial governmental entity subordinate to the federal State. It stands to reason that in this case the conduct of the organ in question is, in virtue of Article 5 of the present draft, the act of the component state; the problem of attributing the conduct in question to the federal State does not even arise in this hypothetical case, which thus automatically falls outside the scope of those covered by this article.<sup>54</sup>

The rule adopted by the Commission regarding territorial units in paragraph 1 of Article 7 is terse and clear.

The conduct of an organ of a territorial governmental entity within a State shall also be considered as an act of that State under international law, provided that organ was acting in that capacity in the case in question.<sup>55</sup>

How to deal with public corporations and similar institutions was a far more difficult question. The Special Rapporteur in his Third Report outlined the scope of the problem.

... The emergence and proliferation of public institutions is a phenomenon of our time, which is marked today by a tendency towards progressive differentiation and a wider separation between the organization of these institutions and the administration, structures and methods of the State. The diversity of the tasks of common interest which the community itself has to perform in a modern society, the ever-increasing number of services which only the community is able to provide, the gradual extension of these services to the most widely different sectors of economic, social and cultural life, the fact that they are often of a technical nature and thus require autonomy of decision and action and the possession of special qualifications, the need to make procedures more flexible and simplify controls in order to increase the efficiency of the service—these, in short, are the main causes of the phenomenon. Thus, side by side with the State, there have been and are being established a number of institutions which, though their functions give them a distinctly public character, have a separate legal personality under the internal legal system, possess their own organization distinct from that of the State and are subject, in their activities, to a legal regime *sui generis*, which may partake some-

<sup>54</sup> *Id.* at 318.

<sup>55</sup> *Id.* at 319.

times of public law and sometimes of private law, according to requirements.<sup>56</sup>

The enormous variation in organization, function, autonomy and authority of these entities led the Commission to discard a nominalistic approach to identifying them. The use of terms such as "public corporation" or "public institution" as a basis for attribution of international responsibility would serve only to raise the question of what factors make an entity "public."

The possibilities of defining the entity in a negative manner were also considered. An example of this method is found in Article 17(2) of the Sohn-Baxter draft convention of 1961.

. . . any enterprise normally considered as commercial which is owned in whole or part by a State . . . if such enterprise is, under the law of such State, a separate juristic person with respect to which the State neither accords immunity in its own courts or claims immunity in foreign courts.<sup>57</sup>

The Commission considered that it would be preferable to seek a positive test for attribution. In any particular case the activities in which an entity is engaged or the extent of state ownership of the entity or its juristic personality or its immunity from suit under internal law might or might not have a bearing on whether its conduct should be attributed to the state. The test of sovereign immunity in the international sense has both subjective and accidental aspects that postulate a high degree of uncertainty in the application of the concept. As discussion of these and other tests continued, the Commission concentrated on the issue why a state should be held responsible for the acts of entities with which it might have myriad relationships. The thesis around which consensus developed was that the responsibility of the state should be engaged when the act of the entity involved the exercise of the power of the state, or "privilèges de puissance publique" as Mr. Reuter termed it. This concept is set out in paragraph 2 of Article 7.

The conduct of an organ of an entity which is not a part of the formal structure of the State or of a territorial governmental entity, but which is empowered by the internal law of that State to exercise elements of the governmental authority, shall also be considered as an act of the State under international law, provided that organ was acting in that capacity in the case in question.<sup>58</sup>

The rule is not without its own elements of difficulty, particularly because of the generality of the phrase "governmental authority." Some concern along this line was expressed in the Sixth Committee.<sup>59</sup>

Moreover, its sweep is broad. For example, under Article 41, section 63 of the Code of the Public General Laws of Maryland, ". . . any firm, corporation, partnership, sole proprietorship or other entity existing and functioning

<sup>56</sup> 3rd Report, *Responsibility* 60, 61.

<sup>57</sup> GARCÍA-AMADOR, SOHN, AND BAXTER, *RECENT CODIFICATION OF THE LAW OF STATE RESPONSIBILITY FOR INJURIES TO ALIENS* 253 (1974).

<sup>58</sup> ILC 26th Report 308.

<sup>59</sup> Report of the Sixth Committee, UN Doc. A/9897, at 38 (1974).



for a legitimate and legal business purpose . . ." may apply for the appointment "of special police to patrol and preserve peace and good order upon the business premises." Under Article 41, section 64, a special policeman appointed for the purpose may exercise the powers of a police officer upon those premises.<sup>60</sup> A person to whom the police power of a state has been delegated is undeniably empowered to exercise elements of the governmental authority. The conduct of a special policeman employed by the ABC Company in Baltimore may, under draft Article 7, be attributed to the United States. It might be noted that Maryland has insulated itself from any responsibility for the actions of special police.<sup>61</sup>

Equally wide is the reach of Article 8. Here the Commission is dealing not with "entities," its portmanteau term for all the varieties of juridical personality embraced by Article 7, but with persons.

*Attribution to the State of the conduct of persons  
acting in fact on behalf of the State*

The conduct of a person or group of persons shall also be considered as an act of the State under international law if

(a) it is established that such person or group of persons was in fact acting on behalf of that State; or

(b) such person or group of persons was in fact exercising elements of the governmental authority in the absence of the official authorities and in circumstances which justified the exercise of those elements of authority.<sup>62</sup>

In view of Article 7, it might be assumed that Article 8 is concerned solely with natural persons. The commentary makes repeated reference to "private individuals or groups of private individuals" and "private persons." However in one paragraph it refers to ". . . the conduct of persons (individuals or private entities . . .)" and also remarks that ". . . the word person is preferred to 'individual' so as to include both a private individual and, for instance, an association or private company."<sup>63</sup> However the absence of any reference to "organs" in Article 8 raises doubts as to the accuracy of these two comments. Article 7 is clearly drafted on the basis that juridical entities act through organs. If, in Article 8, a person includes a private company, then that article is saying that private companies act of themselves.

The issue is of importance because if private companies fall within the ambit of both articles then the scope of the convention is widened enormously. The responsibility of the state may be engaged by the act of a private corporation not only when the corporation is exercising govern-

<sup>60</sup> 4A ANNOTATED CODE OF THE PUBLIC GENERAL LAWS OF MARYLAND 272 (1974). While such delegation of the police power is not common within the United States, the proliferating use of private police and their toleration or acceptance by local governments could support the conclusion that they are in fact exercising some aspects of government authority. See Steenberg, *Private Police Practices and Problems in Law and the Social Order* 585 (1972).

<sup>61</sup> ANNOTATED CODE, *supra* note 60, at Art. 41, §69, 274.

<sup>62</sup> ILC 26th Report 324.

<sup>63</sup> *Id.* at 322, 333.

mental authority but whenever it is "... in fact acting on behalf of the State." Any corporation, organized under private law, in which a government entity has substantial financial holdings or over which it exercises substantial control could legitimately be said to be acting on behalf of the state. So might any corporation which is performing any type of service for a governmental entity. This interpretation would move the boundaries of international responsibility considerably beyond their present limits.

Restriction of the scope of the article to natural persons would not give rise to the same concerns. The complex problems raised by the commercial activities of governments and their financial, contractual, and administrative relationships with private or mixed enterprises are eliminated, because substantial business operations are rarely conducted by individuals acting as such. This leaves Article 8(a) applying to the traditional cases that gave rise to the rules and which are discussed in the commentary—persons employed as informal ancillaries to military or police forces plus spies, saboteurs, and the like.<sup>64</sup>

Subparagraph (b) of the article deals with emergency situations. The formal governmental authority in an area is disrupted or destroyed by earthquake, hurricane, military invasion and the private citizens remaining organize to provide temporary social order. While the case is exceptional, the Commission considered that it merited mention.

The final problem dealt with by the Commission concerns responsibility for acts of an organ of a state or international organization which has been placed at the disposal of another state. The international responsibility of the State at whose disposal the organ has been placed may be engaged if the organ "... was acting in the exercise of the governmental authority ..." of that state.<sup>65</sup> The rule is an uncomplicated one. The commentary points out that the article applies only if the organ retains its character as such. An expert lent by one government to another could, depending upon the circumstances, remain an organ of the lending state or become an organ of the borrowing state. A gloss is put upon the phrase "placed at the disposal of a State" by the explanation that "... in performing the functions entrusted to it by a beneficiary State, the organ shall act in conjunction with the machinery of that State and under its exclusive direction and control, not on instructions from the sending State."<sup>66</sup> Whether this formulation may not be too rigid deserves consideration. There may well be situations in which direction and control is not exclusive but is sufficient to support attribution of the act to the beneficiary state. This might generally be the case when military units are made available to a state, for example, to assist in coping with the effects of a natural disaster. The rescue or rehabilitation work would normally be carried out under the overall direction of the beneficiary state but command control over the troops would normally remain in the sending state.

<sup>64</sup> *Id.* at 324-28.

<sup>65</sup> *Id.* at 333.

<sup>66</sup> *Id.* at 336.

The commentary specifies, however, that military forces sent to another state for purposes of "military aid" are not placed at the disposal of that state, at least for the purposes of subparagraph (b).<sup>67</sup>

Numerous speakers in the Sixth Committee urged the need for accelerated progress in dealing with the subject of state responsibility and this view was reflected in General Assembly Resolution 3315 of December 14, 1974, which recommends that the Commission continue its work in this field on a high priority basis.<sup>68</sup>

#### TREATIES AND INTERNATIONAL ORGANIZATIONS

Mr. Reuter's Third Report on treaties concluded between states and international organizations proposed five draft articles.<sup>69</sup> The organizational principle is described as follows:

. . . The method used has been determined by one basic fact: the essential purpose of the work to be done is to permit, as far as possible, the extension of the provisions of the Vienna Convention on the Law of Treaties to agreements concluded between States and international organizations or between two or more international organizations. Of course, this aim does not exclude adaptations which go beyond matters of drafting, nor even substantial additions, as appropriate, but it implies that the International Law Commission should remain as faithful as possible to the Vienna Convention on the Law of Treaties.<sup>70</sup>

This methodology was supported without demur by the Commission with the happy consequence of both simplifying and speeding up work on the proposed articles. Thus Article 1 of the Vienna Convention, which makes that treaty applicable ". . . to treaties between States,"<sup>71</sup> had only to be modified to make the draft articles applicable to the two varieties of treaties to be dealt with: ". . . (a) treaties concluded between one or more States and one or more international organizations, and (b) treaties concluded between international organizations."<sup>72</sup> Similar changes were made in Article 2, paragraph 1, of the Vienna Convention on "Use of Terms." It is worth noting that, while the Vienna definition of "international organization" as an "intergovernmental organization" is carried over without change, the commentary points out that the term must be understood in its commonly accepted sense which includes some organizations composed of both states and international organizations.<sup>73</sup> It is likewise pointed out that ". . . no attempt has been made to prejudge the amount of legal capacity which an entity requires to be regarded as an international organization within the meaning of the present draft. The fact is . . . that the main purpose of the present draft is to regulate, not the status of international organizations, but the regime of treaties to which one or more in-

<sup>67</sup> *Id.* at 339.

<sup>68</sup> GA Res. 3315(XXIX), Dec. 14, 1974.

<sup>69</sup> UN Doc. A/CN.4/279 (1974) [hereinafter *3rd Reuter Report*].

<sup>70</sup> *Id.* at 4.

<sup>71</sup> *Supra* note 24.

<sup>72</sup> ILC 26th Report 353.

<sup>73</sup> *Id.* at 358.

ternational organizations are parties.”<sup>74</sup> Nonetheless, capacity proved to be a problem that could not be set aside. Articles 3 and 4 of the Vienna Convention on international agreements not within the scope of the treaty and on nonretroactivity were likewise adopted without substantial changes, and the Commission concluded that Article 5 of the Vienna Convention on treaties constituting international organizations and treaties adopted within an international organization was outside the reach of the draft articles.

The adoption of Article 6 of the Vienna Convention, however, gave rise to a major debate. This article dealing with the capacity of states to enter into treaty relationships provides simply that “[e]very State possesses capacity to conclude treaties.”<sup>75</sup> The preliminary discussions on treaties and international organizations held in 1973 had established that there were sharp divergences of view within the Commission on the treaty-making capacity of international organizations.<sup>76</sup> The issue, of course, was not one of the simple adoption of Vienna Article 6 to define the capacity of international organizations. No member of the Commission advanced the thesis that states were barred from establishing an international organization by a charter that specifically denied it treaty-making authority. The issue was between those who view an international organization as a collectivity of states and those who consider the whole as something more than the sum of its parts, or, as the International Court put it:

Under international law, the Organization must be deemed to have those powers which, though not expressly provided in the charter, are conferred upon it by necessary implication as being essential to the performance of its duties.<sup>77</sup>

In his Third Report, Mr. Reuter examined the problems from all aspects and reached the conclusion that “. . . a general formula relating to the capacity of international organizations to conclude treaties must be sufficiently flexible to cover all possible solutions and respect the prodigious diversity of a phenomenon which is currently too markedly subject to the will of States for limits to be placed on the free choice of those States.”<sup>78</sup> The formula proposed to achieve this end was:

In the case of international organizations capacity to conclude treaties is determined by the relevant rules of each organization.<sup>79</sup>

In describing the possible effect of this proposal the Special Rapporteur makes the point that the Treaties Convention “. . . in no way rules out the possibility that through the interpretation of constituent instruments, an international organization may be made to appear to have the capacity to conclude treaties, even where such capacity is not explicitly specified in

<sup>74</sup> *Id.* at 358, 359.

<sup>75</sup> *Supra* note 24.

<sup>76</sup> Kearney, *The Twenty-Fifth Session of the International Law Commission*, 68 AJIL 472 (1974).

<sup>77</sup> *Reparation for Injuries Suffered in the Service of the United Nations*, Advisory Opinion of April 11, 1949, [1949] ICJ 182.

<sup>78</sup> 3rd Reuter Report 40.

<sup>79</sup> *Id.* at 28.

the constituent instrument . . ." on the basis of the subsequent practice rule in Article 31, paragraph 3(b).<sup>80</sup> This would appear to stretch the possibilities of the formula somewhat beyond the compass of the reference to the rules of the organization, although in actuality the distinction might be blurred.

The differences that had surfaced in 1973 were maintained in 1974. The formula proposed by Mr. Reuter was eventually accepted as an acceptable compromise between the differing points of view. As the commentary puts it:

The wording . . . is the result of a compromise based essentially on the finding that this article should in no way be regarded as having the purpose or effect of deciding the question of the status of international organizations under international law; that question remains open, and the proposed wording is compatible both with the conception of general international law as the basis of international organizations' capacity and with the opposite conception. The purpose of Article 6 is merely to lay down a rule regulating the law of treaties.<sup>81</sup>

#### INTERNATIONAL WATERCOURSES

The General Assembly at its twenty-eighth session recommended that the Commission should begin its work on the law of the non-navigational uses of international watercourses at its 1974 session.<sup>82</sup> The recommendation, to a certain extent, was based on information that the supplementary report of the Secretary-General on legal problems relating to the non-navigational uses of international watercourses would be ready for consideration by the Commission in 1974. The original report of the Secretary-General on "Legal Problems Relating to the Utilization and Use of International Rivers" had been published in 1963 and contains a wealth of information.<sup>83</sup> The very substantial developments in practice and theory in the 1960's regarding international uses of fresh water had led the General Assembly to request an updating of the study in 1970.<sup>84</sup>

In March 1974 the Secretariat issued the supplementary report in two volumes.<sup>85</sup> This first-rate study provided a basis for the Commission to begin its work on international watercourses. Following the precedent established with regard to some other major topics,<sup>86</sup> the Commission at the beginning of the twenty-sixth session set up a subcommittee of five members chaired by the writer to propose the limits and goals that the Commission might adopt in this area.

The subcommittee produced a report based upon a distillation of memoranda submitted by each of its members. This report was adopted by

<sup>80</sup> *Id.* at 35.

<sup>81</sup> ILC 26th Report 366.

<sup>82</sup> GA Res. 3071(XXVIII), Nov. 30, 1973.

<sup>83</sup> UN Doc. A/5409 (1963) in three volumes.

<sup>84</sup> GA Res. 2669(XXV), Dec. 8, 1970.

<sup>85</sup> *Legal Problems Relating to the Non-Navigational Uses of International Waterways*, UN Doc. A/CN.4/274 (1974).

<sup>86</sup> BRIGGS, *THE INTERNATIONAL LAW COMMISSION* 231-33 (1965).

the Commission at its 1,297th meeting on July 22, 1974, for submission to the General Assembly.<sup>87</sup> The report deals with the question of "the nature of international watercourses" and reaches the conclusion that the term could be interpreted as ranging from the broad reach of international drainage basins on the one hand to the more limited scope of common and contiguous rivers and lakes on the other.

A review of both treaty practice and doctrinal analysis led to the conclusion that "... the term 'international watercourses' does not possess a sufficiently well-defined meaning to delimit, with any degree of precision, the scope of the work which the Commission should undertake on the uses of fresh water."<sup>88</sup> Accordingly the report suggests that states be requested to submit their views on the appropriate scope of a definition of international watercourses and, in particular, to comment on whether "... the geographical concept of an international drainage basin ..." is appropriate for study in the first place of the non-navigational uses of international watercourses, and in the second place, of the legal aspects of the pollution of international watercourses.<sup>89</sup>

A brief review of non-navigational uses follows which leads to the conclusion that "... the major effects of various uses upon watercourses is to change the quantity of water available, the rate of flow of the water and the quality of the water." These changes are all interrelated in the sense of affecting the availability of fresh water for various uses. When the watercourses concerned are international, the result is competition not only among the different national users for the available water but also among the users in the different border or riparian states. In large part, the task of the Commission would be "... to determine and to formulate the legal principles which should be applied to regulate this competition."<sup>90</sup> In conducting its study of this problem, the Commission suggests fourteen uses of fresh water that should be examined and asks states to suggest whether any other uses should be included and also whether allied problems such as flood control and erosion should be studied.

The report then moves to a consideration of the priorities which should be assigned in conducting the study. The point is made that, in general, the study of uses and the study of pollution, or abuses, are fundamentally concerned with different legal principles, the former being a question of distributive justice and the latter the point at which legitimate uses of water for waste disposal become illegitimate because of the effects produced in another state—a question with a considerable element of abuse of rights in it. In light of this difference the report requests the views of governments whether the Commission should commence its work by taking up first the question of pollution as one which affects all the uses of fresh water.<sup>91</sup>

The writer was appointed Special Rapporteur for this subject.

<sup>87</sup> ILC 26th Report 372.

<sup>88</sup> *Id.* at 376.

<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 379.

<sup>91</sup> *Id.* at 381.

In General Assembly Resolution 3315(XXIX) the Commission's request for a two-week extension of its annual sessions, "subject to review by the General Assembly whenever necessary . . .," was approved.

The twenty-sixth session had been allotted twelve weeks on a one-time basis and the results of the session indicated that a two-week extension could produce greater results than a mere arithmetical calculation would indicate. The extra benefit comes from the greater momentum which expansion of the work period engenders. Even so, summer's lease has all too short a date.

### Corrigenda

The correct identification of Mr. Herbert Brownell, the coauthor of "The Colorado River Salinity Problem with Mexico" appearing in the April 1975 issue of the *Journal* at page 255, is "Formerly Attorney General of the United States, 1953-1957."

In the *Proceedings of the 68th Annual Meeting of the American Society of International Law* (now published separately from the *Journal*), the first sentence following the title in the middle of page 38 should read:

"The panel convened at 11:00 a.m., April 25, 1974, Congressman E. (Kika) De La Garza (D., Texas), presiding."

We apologize to Mr. Brownell, Congressman De La Garza, and our readers for these erroneous identifications.

A.P.S.

## EDITORIAL COMMENTS

### WORD MADE LAW:

#### THE DECISION OF THE ICJ IN THE NUCLEAR TEST CASES

The Nuclear Test cases<sup>1</sup> again remind lawyers of what *Marbury v. Madison*<sup>2</sup> had earlier demonstrated to the U.S. bar: that cases need not have monumental outcomes to make monumental law. It will be recalled that in *Marbury v. Madison* the Supreme Court shied away from issuing a writ of mandamus to the Secretary of State, James Madison, requiring him to deliver up to Mr. Marbury his judicial commission which had been signed and sealed during the last moments of the preceding presidential administration. The delicacy of the issue was heightened because the Chief Justice and author of the Supreme Court's opinion had been acting Secretary of State in that previous (John Adams') administration until just before the announcement of the election of the new President (Thomas Jefferson). That a Supreme Court mandamus was held not to lie against Madison in that particular controversy is, however, just barely of historical interest today. What has survived and become fundamental to U.S. constitutional law is the landmark constructed by the Supreme Court en route to its mouse of a decision. That reasoning procured for the United States the magnificent concept of judicial review in respect of both executive and legislative action.

The *Nuclear Test Ban* case, also, is a judicial avoidance of confrontation with political authority: France and, indirectly, China, both of which have continued the kind of atmospheric tests which Australia and New Zealand asked the Court to declare illegal. In such a confrontation, the Court's decision, if unfavorable to the two nuclear powers, might well have been ignored. (Had the Court taken on the issue of legal responsibility they might also have produced a majority vote that the present treaty created no legal rights *erga omnes* and no binding customary law applicable to nonsignatories. Or, even if there were a legal obligation in customary law not to cause injury, in the sense of the Trail Smelter arbitration, the majority might still have found a lack of convincing evidence of determinable injury to the applicants attributable solely to respondent's conduct.)<sup>3</sup> Thus the Court chose not to confront the issue of illegality and

<sup>1</sup> Nuclear Tests (Australia v. France), Judgment of December 20, 1974, [1974] ICJ 253, see also *infra* p. 668; Nuclear Tests (New Zealand v. France), Judgment of December 20, 1974, [1974] ICJ 457. The judgments in the two cases are essentially identical and page references, hereafter, are to the same text in, first, the Australian and, second, the New Zealand cases.

<sup>2</sup> 5 U.S. (1 Cranch) 137, 2 L.Ed. 60 (1803).

<sup>3</sup> As to this dilemma, see Dissenting Opinions of Judge de Castro, Nuclear Test Cases, *supra* note 1, at 375, 389-390.



this case, like *Marbury*, produced only a mouse of a decision as to the specific issue. The majority, in effect, held that the cessation of testing by France, together with French public statements declaring an intention hereafter to test only underground, made moot the issue as to which the Court was asked to rule by providing the relief the parties wanted. Technically, the Court (yet again! <sup>4</sup>) decided not to decide.

This led five of the regular judges,<sup>5</sup> together with the applicants' ad hoc judge<sup>6</sup> to voice a strong, even rather persuasive dissent. Basically, they argued that the 1928 General Act for the Pacific Settlement of International Disputes, to which applicants and respondent were parties, gave the Court jurisdiction, that the issues posed were prima facie legal questions to which the Court could address itself, and that, since the applicants wished to exercise their right to have these issues determined, they ought not to be denied. The issue of mootness, as to which it was asserted the parties had not been invited to argue or present evidence in open court, was a matter the dissenters felt could best have been joined to the merits, and which, in any event, could not be disposed of without a specific prior determination by the Court of its jurisdiction in the case.<sup>7</sup>

The majority felt that—at least for purposes of determining “mootness”—they had “inherent jurisdiction” which “derives from the mere existence of the Court as a judicial organ established by the consent of States.”<sup>8</sup> In doing this, they avoided a number of undesirable outcomes. They prevented further extensive litigation of a case in which one of the parties—France—felt no obligation to participate. The Court also avoided the possibility of doing another *Barcelona Traction*, i.e., of having a prolonged and expensive litigation on the merits resulting in an eventual dismissal of the application on an essentially procedural ground.

The majority opinion is quite brief. It constitutes a judicial limitation on the claims submitted by the applicant. But more than that, it stakes out a most significant proposition of law which, in turn, made possible the key finding of fact that the case had been rendered moot by France's unilateral statements concerning cessation of nuclear testing. This finding of law is, in the international law sphere, probably no less significant in its way than the law made by *Marbury v. Madison*. In the words of the Court:

<sup>4</sup> Northern Cameroons Case (Cameroon v. United Kingdom) [1963] ICJ 15; South West Africa Case, Second Phase, (Ethiopia v. South Africa; Liberia v. South Africa) [1966] ICJ 6; Barcelona Traction, Light and Power Company, Limited Case, Second Phase, (Belgium v. Spain) [1970] ICJ 3. The Lachs Court, however, is notably different from its predecessor in that the *Nuclear Test* Cases, while technically not decided in the applicants' or respondent's favor, provide a declaration of law that essentially meets the request of the former. Moreover, the decision not to decide on the substantive merits was in the *Nuclear Test* Cases made early in the proceedings, thereby avoiding the frustration created by the earlier cases.

<sup>5</sup> Joint Dissenting Opinions of Judges Onyeama, Dillard, Jiménez de Aréchaga, and Sir Humphrey Waldock, *Nuclear Test* Cases, *supra* note 1, at 312 and 494; also, Dissenting Opinions of Judge De Castro, 372 and 524.

<sup>6</sup> Dissenting Opinions of Judge Sir Garfield Barwick, *supra* note 1, at 391 and 525.

<sup>7</sup> *Id.* 319-24; 502-08.

<sup>8</sup> *Id.* 259-60; 463.

It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the declaration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive. . . .

One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.<sup>9</sup>

The unilateral statements which the Court took to constitute a binding legal commitment by France include series of communiqués, messages, and press interviews in which the President of France, the French Ambassador to New Zealand, the French Foreign Minister, and the Minister of Defense had stated that their country had reached a stage of nuclear development which indicated that the controverted series of atmospheric tests could now be followed by tests conducted only underground. In a message to the New Zealand Ministry of Foreign Affairs, the French Embassy in Wellington had noted that "the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type."<sup>10</sup> At a press conference after the tests, the French Defense Minister again

<sup>9</sup> *Id.* 267-68; 472-73.

<sup>10</sup> *Id.* 266 and 470.

repeated the statement that France would hold no atmospheric tests in 1975 and would concentrate on underground explosions. When the press remarked that he had failed to add the "normal course of events" qualification, he agreed that he had and this led the Court to conclude that "the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression 'in the normal course of events.'" <sup>11</sup>

The Court's view as to the legal consequences of such statements is an important but not unconscionable extension of prior decisions respecting verbal statements. An earlier editorial comment in this *Journal* has dealt with some historical precedents, including a finding by the Lytton Commission of Inquiry in its report to the League of Nations in 1933 which upheld as binding some unilateral Chinese oral declarations made in Peking to the Japanese representative relative to the railway rights of the two countries in Manchuria.<sup>12</sup>

One case stands out in the jurisprudence. The "Ihlen Declaration" respecting Eastern Greenland was an informal verbal undertaking by the Foreign Minister of Norway, made in the course of regular negotiations on the matter, that his country "would not make any difficulties in the settlement of this question" of Danish plans in respect of Greenland. When, later, Norway sought to contest the Danish rights, the Court held that such a reply in response to the Danish Foreign Minister's inquiry, as long as it was within the ostensible area of responsibility of the Minister, is binding on his country in international law.<sup>13</sup> It must be noted, however, that the Danish inquiry had contained a reciprocal verbal commitment to raise no objections to Norwegian sovereignty over Spitzbergen and this interdependence between the two statements helped influence the Court. To the extent that the *Nuclear Test* case makes new law, it is in recognizing that a written or verbal undertaking may give rise to legal rights even when made without such reciprocal or mutual exchange of commitments, outside the context of formal negotiations, and to the world at large, to the whole community of states, or to unspecified but ascertainable beneficiaries.<sup>14</sup>

This is a most useful step forward in international jurisprudence. It is particularly helpful, at a time when Egypt is indicating a willingness to undertake binding commitments in respect of Israel but not to enter into an agreement *with* Israel, that the theory of law should offer no impedi-

<sup>11</sup> *Id.* 267 and 471; 276 and 472.

<sup>12</sup> James W. Garner, *The International Binding Force of Unilateral Oral Declarations*, 27 AJIL 493 (1933).

<sup>13</sup> Denmark v. Norway, [1933] PCIJ, ser. A/B, No. 53; 3 HUDSON, WORLD COURT REPORTS 148 (1938).

<sup>14</sup> This distinguishes a unilateral binding undertaking from a formal agreement made between several parties, which, according to Article 102 of the Charter of the United Nations, must be registered with the UN Secretariat to be invoked by a party to the treaty. The proviso is obviously inapplicable to unilateral undertakings where the invoking beneficiary is never a "party."

ments to such unilateral but legally binding accommodations.<sup>15</sup> More broadly, we live in an age of the potential nuclear miscalculation. It is crucial to the avoidance of such miscalculations that states should signal to each other in such a way as to engender reliance and diminish the chance of false expectations. "Watch what I do, not what I say" is a cultural predisposition of some—particularly the Anglo-Saxon—societies which is extraordinarily dysfunctional amidst the realities of contemporary international politics.

Thanks to the Court's decision, each state must now recognize that what it solemnly says it will do, or, more important, what it says it will not do, becomes a part of that trellis of reciprocal expectations on which the fragile international system grows. Professor Weisband and I have elsewhere examined this phenomenon of verbal behavior and come to the same conclusion now adopted by the Court:

Among reasonable men it is customary and, indeed, necessary to presume that a person means what he says. Where this presumption fails, the resultant loss of credibility shuts the disbelieved individual off from normal social intercourse and leads him and those with whom he deals to miscalculations and chaos. So, too, when a state speaks. If a national official, vested with the ostensible power to commit and bind his country, speaks in his formal capacity, others in the international community have a right to assume that he intends his words to be a deliberate expression of state policy. . . . In the community of states, when a nation speaks to explain why it is embarking on a course of action, it is ordinarily understood by other states also to be proposing a principle for future conduct or reinforcing an existing principle. Other states have a right to assume that the speaker knows and intends this level of his meaning and that he knows that the listening states make this assumption. On this shared mutual expectation rests the element of predictability that prevents relations between states in the nuclear era . . . from being chaotic and far more dangerous than they usually are.<sup>16</sup>

Reason leads one to agree, also, with the Court's caveat that not all public statements by states are henceforth to be treated as constituting binding legal obligations. Intentionality, as the Court said, must be the test. But intention cannot be determined solely by reference to the speaker's state of mind but must also take into account that of the listeners. A spokesman for state policy—like the President of France, who speaks with the solemn voice of "acts of the French State"—must be taken to intend the natural consequences of his words just as actors are assumed,

<sup>15</sup> It will be recalled that Egypt made a unilateral declaration, intended to create legal obligations, upon the reopening of the Suez Canal in 1957. See Egyptian Declaration of April 24, 1957, annexed to letter to the Secretary-General of the United Nations from the Egyptian Minister for Foreign Affairs of the same date, UN Doc. A/3576, S/3818 (1957).

<sup>16</sup> THOMAS M. FRANCK and EDWARD WEISBAND, *WORD POLITICS: VERBAL STRATEGY AMONG THE SUPERPOWERS* 120-21 (1971).

in law, to intend the natural consequences of their acts.<sup>17</sup> If a state speaks, through an ostensible agent, and the statement contains an express commitment to a course of future conduct by that state, it should not be necessary to inquire whether the state intends to be bound but merely whether other states with an interest at stake could reasonably assume that the statement constituted a commitment.

Is it also reasonable to assume that a unilateral statement is not to be regarded as law unless there has been some element of (1) *mutuality* or (2) *reliance*? The decision in the Eastern Greenland case was not very specific about the role Denmark's promise regarding Spitzbergen had in making binding Norway's promise respecting Greenland. But there can be no doubt that the Court was impressed by the fact that Denmark, relying on Norway's unilateral "promise" of noninterference, thereafter proceeded to execute plans and projects for its remote colony. This was a kind of either mutuality or reliance.

In U.S. law, it is recognized that, even absent an exchange of unilateral promises, "there have always been many informal promises that are enforceable without any expression of assent by the promisee and without any consideration in the sense of an equivalent given in exchange. These informal contracts are not 'bargains' and are not made by the process of offer and acceptance. They are 'unilateral' and not 'bilateral' contracts."<sup>18</sup> But common lawyers, reared in the culture of "consideration," have difficulty accepting as truly binding a unilateral commitment wholly devoid of anything like a grain of mutuality. They strive mightily to find such a grain, if only, absent a concurrent mutual exchange of commitments, in the occurrence of a dependent event subsequent to the making of the unilateral statement. Such a subsequent act must be one which suggests that it would not have taken place but for the prior unilateral commitment; and the act must have been undertaken by one to whom the prior commitment may reasonably be held to be applicable.<sup>19</sup> The American Law Institute summarizes the position as follows:

A promise which the promisor should reasonably expect to induce action or forbearance of a definite or substantial character on the part of the promisee and which does induce such action or forbearance is binding if injustice can be avoided only by enforcement of the promise.<sup>20</sup>

At common law, reliance is a necessary ingredient: acts or abstentions based on the assumption that the unilateral promisor will keep his word.

<sup>17</sup> Nuclear Test Cases, *supra* note 1, at 269; 474. For the general proposition in U.S. law, see: *Burr v. Adam Eidemiller, Inc.*, 386 Pa. 416, 126 A.2d 403 (1956); *Garratt v. Dailey*, 49 Wash. 2d 499, 304 P.2d 681 (1956); *Jost v. Dairyland Power Co-op.*, 45 Wis. 2d 164, 172 N.W.2d 647 (1969).

<sup>18</sup> 1A A. L. CORBIN, CONTRACTS 183 (1963).

<sup>19</sup> *Central London P. Trust v. High Trees House* [1947] 1 K.B. 130. Here a tenant continued to occupy and do business in a premises, relying on the landlord's promise to reduce the rent. *Martin v. Meles* 179 Mass 114, 60 N.E. 397 (1901). In *Re Estate of Griswold* 113 Neb. 256, 202 N.W. 609, 38 A.L.R. 858 (1925).

<sup>20</sup> Restatement of Contracts, §90 (1932).

"It is now quite clear," Corbin has pointed out, "that an informal promise may be enforceable by reason of action in reliance on it, even though that action was not bargained for by the promisor and was not performed as an agreed exchange for the promise."<sup>21</sup> However, the reliant action or forbearance "must amount to a substantial change of position. . . . Of course, in every case the question will arise, What is substantial? It cannot be answered by a formula. It is a matter of fact, to be determined by court. . . . Beyond doubt, it is relative to the other circumstances and especially to the content of the promise and the cost to the promisor of his promised performance."<sup>22</sup> It has been held, for example, that to make binding a unilateral promise of a donation to a charity, it is sufficient for the charity merely to go on doing its usual work.<sup>23</sup>

Is reliance, in this Anglo-Saxon sense, part of the Court's decision? It seems not.

It would have been easier to find reliance in the *Nuclear Test* cases if Australia and New Zealand, upon reading the French disclaimers of intent to conduct further testing, had withdrawn their suit. In fact, however, they did quite the opposite, arguing that the French statements were inconclusive. This may have been good legal tactics, for it produced a decision by the Court that definitively interprets the legally binding character of the unilateral French declarations and precludes the possibility that France can later claim to have been misunderstood by its antipodean listeners. But it also manifests Australia's and New Zealand's nonreliance on the French statements. To overcome this, the Court declared that it would "form its own view of the meaning and scope intended by the authors of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text."<sup>24</sup> Technically, then, reliance was placed on the French statements not by applicants but by the majority of the International Court. Moreover, it is the Court, not the applicants, which acted in reliance on the French unilateral declarations, relinquishing jurisdiction and determining the case to be moot.

The issue of reliance arises in a related matter. In dismissing the case, the Court's majority added that, if the French failed to comply with their oral undertaking, the applicants could "request an examination of the situation" by the Court and that this would in effect be regarded as a revival, *nunc pro tunc*, of the terminated proceedings. This is the first time the ICJ has contemplated the possibility of noncompliance and made provision accordingly. That such follow-up litigation should later be regarded as a continuation of the present case, rather than a new action, is made important by France's petulant renunciation in 1974, after the commencement of the present case, of the 1928 General Act for the Pacific Settlement of International Disputes on which the Court's jurisdiction was implicitly founded in the present action and on which it would again rely

<sup>21</sup> CORBIN, *supra* note 18, at 193.

<sup>22</sup> *Id.* 215-16.

<sup>23</sup> In *Re Griswold*, note 19 *supra*.

<sup>24</sup> *Nuclear Test Cases supra* note 1, at 269, 473-74.

in a future resumption of its jurisdiction. The majority makes it clear that if France resumed testing "the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot by itself constitute an obstacle to the presentation of such a request."<sup>25</sup> But if a future legal action is to be regarded strictly as a resumption of the 1974 litigation, then the binding obligation of France cannot be founded on reliance by the applicants since such reliance as Australia and New Zealand may currently be exhibiting—the Australian Prime Minister has been quoted in *Le Monde* of January 8, 1975, as accepting the binding nature of the French President's public statement—cannot be said to have been manifested until after the Court had rendered its decision.

The Court appears, therefore, to be acting on the assumption that the French statements are binding because they were made at the time they were made and not because of any subsequent element of reliance. Read strictly, the decision states a simple proposition to the effect that a unilateral commitment becomes binding in law at the moment it is made. It may thus be that the Court believes law can emerge from a unilateral statement whether or not it is subsequently relied upon. If so, this would be a considerably more radical departure, on the part of the Court, from previous concepts of binding commitment at least as these are understood by Anglo-Saxon lawyers.

Another way to look at the majority's decision *quae* reliance is to conclude that the Court found *constructive* reliance, *i.e.*, that the applicants having indicated that they *would* rely if France made a binding statement, the Court, by ensuring that the statements are legally binding, has produced the necessary condition for the reliance to have vested retroactively, at the time the statements were made. The reliant act of dropping the case may have been forced on the applicants by the Court, but it is the applicants who could be said to have indicated their willingness to have the case dropped if France made a binding commitment. Obviously, however, this is a conceptual analysis not wholly without difficulties.

Reliance, in common law, may seal a promise much as acceptance seals an offer. If the Court has done away with the ingredient of reliance, some future international court may have to determine whether, and under what circumstances, a unilateral promise may be withdrawn. If reliance were relevant, the unilateral promise could, presumably, be withdrawn until relied upon or for as long as it had not as yet been acted upon by another.<sup>26</sup> But if reliance is not a necessary ingredient, any intended unilateral promise becomes irrevocable even though its maker seeks to repudiate it before any state has taken it up. Perhaps it is only the writer's

<sup>25</sup> *Id.* 272, 477.

<sup>26</sup> For the domestic counterpart rule, see Seavey, *Reliance Upon Gratuitous Promises or Other Conduct*, 64 HARV. L. REV. 913 (1951). Seavey is of the view that a promisor may withdraw his promise by timely notification to the promisee.

Anglo-Saxon attitudes that cause mild distress at the prospect of a party being bound by a commitment made in the absence of any reciprocal or concomitant act or abstention and that is subsequently withdrawn without adversely affecting any other party which can be said to have relied on it. On the other hand, perhaps reliance has become a meaningless concept in a tight little global community, with its crucial interdependence among the actors making it inevitable that everything one state says by way of specific promise is bound to affect the perceived world reality, the future expectations, and thus the planning of all other states.

These are matters that may well be clarified in subsequent cases. For now, it is sufficient to note the extraordinary importance of the law made by a case in which, technically, the court has refused to decide. In all, there is reason to believe that, as with *Marbury v. Madison*, the legal community will welcome and build on the foundation laid in the *Nuclear Test* cases long after the specific outcome of the dispute between France and its antipodean opponents has been forgotten.

The practical consequences for U.S. foreign policymakers should, finally, be underscored. In light of these two decisions, a statement made by President Nixon to President Thieu of South Vietnam to the effect that the United States would "react vigorously"<sup>27</sup> to a new North Vietnamese offensive in violation of the Paris Peace accords, which was an inducement to get Thieu's consent to the agreement, would clearly constitute a case of unilateral commitment followed—if it is, indeed, a necessary element—by reliance. The upshot is, therefore, a binding legal undertaking by the United States, made by a President endowed with the ostensible as well as constitutional authority to make such a commitment. The subsequent action of Congress in limiting the President's power to carry out his promise is irrelevant to vested international legal rights.<sup>28</sup> Leaders are now on notice that, in making such declarations they are not merely expressing a passing fancy, but pledging the good faith and credit of their nations. If they do so rashly, they damage their country's rating as a law-abiding and credible member of the community.

THOMAS M. FRANCK

### DUE PROCESS IN THE UNITED NATIONS

Recent events in the United Nations, especially the actions taken against South Africa and Israel have led to two main types of responses. Some conclude that these actions prove that the United Nations has deteriorated to the point that it should be abandoned. Others claim that all the difficulties can be cured by a drastic revision of the Charter.

<sup>27</sup> The New York Times, April 10, 1975, at 1.

<sup>28</sup> See Article 46 of the Vienna Convention on the Law of Treaties, UN Doc. A/CONF.39/27 (1969), 63 AJIL 875, 890 (1969).



There is, however, a middle road which might be followed instead, a return to the basic principle of all well-balanced legal systems—due process of law. It is in the interest of all concerned that UN decisions should be arrived at with a proper regard to the principles of the Charter and international law. Once decisions are so adopted, there is a greater likelihood that they will be followed, rather than grossly disregarded as in the past. Without any drastic revision of the Charter of the United Nations, something can and should be done about the procedural and decisionmaking difficulties of the United Nations. The necessary changes can be easily incorporated in the rules of procedure of the General Assembly. They should restore both substantive and procedural due process.

As far as *substantive due process* is concerned, the major issue is to make certain that grave objections to the constitutionality or legality of various decisions are properly considered and are not disposed of by the same body whose powers are in question. Thus, if a group of, for instance, fifteen states should object to a proposed decision of the General Assembly on the ground that it constitutes a violation of the Charter of the United Nations, such objection should be referred by the General Assembly to some other body for a preliminary decision. As a minimum, the Legal Counsel of the United Nations, the head of the Office of Legal Affairs in the UN Secretariat, should be requested to present a statement of relevant precedents and his views on their applicability to the case in question. Whenever possible, such a question should be referred to the International Court of Justice for an advisory opinion. Should there be need for a speedy action, a special committee of eminent jurists might be asked for guidance.

From the point of view of *procedural due process*, the most undesirable aspect of some recent decisions is their ad hoc character, without any attempt to consider the matter carefully and to negotiate an agreed solution. In particular, it is dangerous to have matters decided on the floor of the Assembly without prior consideration by a committee. Important questions should not be decided on the spot by means of procedural motions and points of order. A chance should be given to develop maximum consensus through consultations among the regional groups and major powers.

In this respect, it might be desirable to make more general the procedure developed recently at the Caracas Conference on the Law of the Sea, where it was agreed that every effort should be made to reach agreement on substantive matters until all efforts at consensus have been exhausted. To implement this approach, it was agreed, for instance, that any vote on a matter of substance should be deferred for a period not exceeding ten days, if this is requested by at least fifteen representatives. During the period of deferment, the President would be obliged to make every effort to facilitate the achievement of a general agreement. At the end of the period, if agreement is not reached, another decision should be taken whether further consultations would seem desirable, before all efforts to reach agreement are abandoned.

As a minimum, the surprise element might be avoided by requiring that no vote should be taken on any matter of substance less than two days after an official, properly publicized, announcement of such a vote.

Doubts have also been expressed about the actual amount of support a particular resolution has obtained. The numerical majority of states does not automatically represent the views of the real majority of the world's power, however calculated. Without introducing any system of weighted voting, the United Nations computer which tabulates the votes might be programmed to include data relating to each state's population and gross national product. The General Assembly could then authorize the Secretary-General to announce, when so requested by at least ten states, not only the number of states which voted for or against a resolution but also the percentages of the world population and world gross product which are represented by the states voting for or against the resolution. In this manner the claims of alleged nonrepresentativeness of the majority behind a particular resolution could be easily resolved.

The suggestions made here are merely illustrative. The details could easily be changed without impairing their intrinsic merit, and one can imagine many other ways in which UN procedures could be made more satisfactory. If these or similar improvements could be made in the decisionmaking process, the decisions adopted thereby would clearly have a more persuasive force than the decisions adopted by doubtful procedures and under the shadow of unconstitutionality. The likelihood of their acceptance and implementation would be thus greatly enhanced. This would make the whole process more meaningful and would remove some frustrations of the third world countries about the fact that frequently the decisions taken have no effect whatever. There is an important link between due process and the effectiveness of decisions. If one can be improved, the other is likely to follow.

The major powers want to see the decisions made in a responsible way. The third world nations want to see the decisions executed. The obvious answer seems to be: if the decisions are made in a responsible way, reconciling the main points of view, then the major powers will help to execute them effectively and in good faith. If the due process of law is observed in the adoption of decisions, they will more easily be accepted as binding.

LOUIS B. SOHN

#### THE FRANCIS DEÁK PRIZE

Each year, the Board of Editors of the *American Journal of International Law* awards a prize in memory of the late Francis Deák for an especially meritorious article appearing in the *Journal*. The Prize for 1975 has been conferred on Messrs, Allan E. Gotlieb, Charles Dalfen, and Kenneth Katz

for their article "The Transborder Transfer of Information by Communications and Computer Systems: Issues and Approaches to Guiding Principles," appearing in the April 1974 issue at page 227.

The Board of Editors extends its congratulations to the recipients of the Prize and expresses its appreciation to Mr. Philip Cohen, the President of Oceana Publications, Inc., through whose generosity an award is made to the recipients of the Prize.

R.R.B.

## NOTES AND COMMENTS

### THE HELEANNA CASE AND INTERNATIONAL LAWMAKING TREATIES: A NEW FORM OF CONCLUDING A TREATY?

Although the case of the *Heleanna* figured in European newspapers for several weeks, it seems to have passed largely unnoticed by international lawyers. The basic facts of the case are simple, although there may be dispute about matters of detail. The Greek ferryboat *Heleanna* was on its way from Athens to Ancona, when on August 28, 1971, the ship caught fire under circumstances that are still in dispute. When the fire started, the *Heleanna* was 25 nautical miles north of Brindisi and nine nautical miles from Torre Canne, the nearest point on the Italian coast. As Italy claimed only a six-mile territorial sea at this time, the accident clearly happened on the high seas.<sup>1</sup>

The master of the ship, Dimitros Antipas, was arrested by the public prosecutor of Brindisi. The Italian Government contended that some of the twenty-six persons who perished in the accident died within the territorial sea of Italy and one of them in a hospital in Brindisi. This and the fact that some of the deceased were Italian nationals meant, according to the Italian Government, that Italy was entitled to institute legal proceedings against Antipas. On the other hand, Greece claimed sole competence to deal with the case because the *Heleanna* flew the Greek flag.

The case of the *S. S. Lotus*<sup>2</sup> immediately comes to mind. But in the present case, only one ship was involved, and the application of the principle of territoriality is thus even more doubtful than in the *Lotus* case.

Article 11 of the Geneva Convention on the High Seas of 1958<sup>3</sup> attempts to resolve this sort of dispute. Although both Greece and Italy were signatories to the Convention, only Italy had ratified the treaty.<sup>4</sup> The Convention was thus not of its own force binding on the two countries.

The International Convention for the Unification of Certain Rules relating to Penal Jurisdiction in Matters of Collision or Other Incidents of Navigation, signed at Brussels in 1952,<sup>5</sup> also has a bearing on the case.

<sup>1</sup> On February 27, 1973 the Italian Government decided to extend the territorial sea from six to twelve miles. See ARCHIV DER GEGENWART 17805 (1973). The facts of the *Heleanna* case are derived from the official statement of the Ministero della marina mercantile, in Corriere della Serra, Sept. 1, 1971, at 2.

<sup>2</sup> Case of the *S. S. "Lotus,"* [1927] PCIJ, ser. A., No. 9; see also M. O. Hudson, *The Lotus Case*, 22 AJIL 8 (1928).

<sup>3</sup> Convention on the High Seas, done at Geneva, Apr. 29, 1958, 13 UST 2312, TIAS No. 5200, 450 UNTS 82, 52 AJIL 842, 845 (1958).

<sup>4</sup> 521 UNTS 400.

<sup>5</sup> Signed at Brussels, May 10, 1952, 439 UNTS 233.

This Convention, which came into force in 1955, had been ratified by Greece<sup>6</sup> but not by Italy. Article 1 of the Convention provides:

In the event of a collision or any other incident of navigation concerning a sea-going ship and involving the penal or disciplinary responsibility of the master or of any other person in the service of the ship, criminal or disciplinary proceedings may be instituted only before the judicial or administrative authorities of the State of which the ship was flying the flag at the time of the collision or other incident of navigation.

The content of this provision is the same as that of Article 11 of the Geneva Convention on the High Seas. Thus we have two conventions of identical content both signed by the two states concerned, but one state party only to the one and the second state party only to the other. Although neither convention is in force between Italy and Greece, it does not seem just that the two states should not be bound by an obligation which each had separately accepted by ratification of one of two treaties. The *Heleanna* case seems to be the first occasion on which a problem of this kind has arisen. However, with the growing number of lawmaking treaties, it may be expected that such situations will occur more frequently.

The traditional solution—that the states are not bound by the obligation in a case of this character—is altogether acceptable when a *traité-contrat* is involved. In fact, this the only possible solution, because the provisions of a *traité-contrat* reflect a bargain. If the entire bargain is not accepted by the two parties, there is no point in singling out individual provisions of the agreement because of the integration of the whole package of rights and duties in the various articles of the agreement.

But this is not true of multilateral lawmaking treaties. These do not involve so much the striking of a bargain as the establishment of rules for the solution or avoidance of international conflicts. Admittedly, the negotiation of the treaty does involve compromises, and each compromise may, at the time or later, seem more advantageous to one party to the convention than to another. In the *traité-contrat*, the advantages and disadvantages for each party can be, and are normally, weighed at the time of the conclusion of the agreement. But in the case of the lawmaking treaty, a state will often be unable to determine whether it has secured an advantage or been subjected to a disadvantage until an actual dispute arises which calls for resolution under the treaty. For example, Article 11 of the Geneva Convention on the High Seas simply allocates penal jurisdiction to the state of the flag. Greece will be able to exercise its criminal jurisdiction if Italian passengers are killed on a vessel under the Greek flag; Italy will be able to exercise its criminal jurisdiction if Greek passengers die on a vessel under the Italian flag. And so, the advantage under a *traité-contrat* seems fixed from the outset, whereas advantage may lie with one or another party to a multilateral lawmaking treaty, depending on the circumstances.

Of course, there are exceptions to this general rule. If there is a treaty on land-locked states between those states and coastal states, the objective

<sup>6</sup> 560 UNTS 286.

rules for conflict-resolution may confer a clear advantage on one category or another of states from the very outset. The Non-Proliferation Treaty<sup>7</sup> is another instance. The same is true of all treaties which provide solutions for conflicts based upon a certain state of facts that cannot be changed—the land-locked character of certain states or, in the case of the Non-Proliferation Treaty, the prohibition of change incorporated in the treaty itself. These treaties follow the principles of the *traité-contrat*. But in the *Heleanna* case, both parties to the dispute were in the same factual situation of being seafaring nations.

What other interests of Italy and Greece are involved in connection with the application of the Geneva Convention and the Brussels Convention to the *Heleanna* case? First, both states must have found the rule in question to be acceptable and have expressed their will to act according to that rule. Second, each state must desire to be bound only in relation to those states that are similarly bound. And third, for political reasons, a state would not wish to be bound with respect to certain states, such as those it had not recognized.

In the present case, both states had accepted the same legal norm and had ratified the instruments incorporating it. There were no political objections to dealing with the other party, for each by signing one of the conventions had demonstrated that it was willing to assume treaty relations with the other, which might at any time ratify the instrument. And any desired mutuality would be supplied by the fact that each was individually bound by the same rule of law.

Thus the general interests of the parties pointed to the application of the common norm of the two treaties to the *Heleanna* case. And this conclusion is supported by what must be regarded as a strongly shared interest of the two states—the desirability of reaching a peaceful settlement avoiding any sort of conflict.

It is difficult to establish with any certainty why each state had ratified only one of the conventions. There presumably were objections to some provisions of one convention or the other. It may have been that Italy did not consider it worthwhile to ratify the Brussels Convention after it had ratified the Geneva Convention. The Greek Parliament may have been concerned with more urgent matters than the ratification of the Geneva Convention. But one thing remains clear: There was no objection on the part of either state to the principle of the sole competence of the flag state to punish the master or other officers of the vessel.

Thus far it has been shown that there are no objections against, and interests strongly in favor of, an obligation binding the two states. But what has been said does no more than prove that there *should* be such a rule of international law in order to promote an undisputed objective of international law—to settle disputes according to the common interests of nations.

<sup>7</sup> Done at Washington, London, and Moscow, July 1, 1968, 21 UST 483, TIAS No. 6839.

From a strictly juridical point of view, there could be a legal duty in the *Heleanna* case only on the basis of a treaty, a norm of customary international law, or a general principle of law.<sup>8</sup> It might be said in support of a general principle of law that it would be a violation of good faith if two states accepted the same solution for potential disputes under the terms of two different conventions and then failed to settle their dispute according to that solution. The International Court of Justice has also recently held that there can be customary international law solely on the basis of *opinio juris* without *consuetudo*.<sup>9</sup> The strongest expression of *opinio juris* is the ratification of a lawmaking treaty. It would thus follow that the two ratifications have formed a rule of customary international law between Italy and Greece. Neither argument is fully persuasive, and even their combined force may not be enough to construct a rule of customary international law in a situation in which a treaty obligation cannot be found. On the other hand, these considerations give added weight to the shared interests that have been previously referred to.

As neither the adoption of a rule of customary international law nor the creation of an obligation on the basis of good faith is satisfying, it is necessary to return to the question of a treaty nexus between the two states. What the Greek ratification of the Brussels Convention amounts to is a declaration that Greece will concede penal jurisdiction under certain circumstances to the state of the flag if that state has accepted the same obligation. Italy, one of the signatories to the Brussels Convention, has accepted the same obligation in the Geneva Convention. The same analysis holds true if we start with the Italian ratification of the Geneva Convention as a declaration and the Greek ratification of the Brussels Convention as an acceptance. Are these acts sufficient to constitute an offer and acceptance of treaty relations?

In the case of lawmaking treaties, the nonacceptance by one state of the convention does not necessarily signify that all of the rules of that treaty are unacceptable to the state. On the contrary, as French practice with respect to the ratification of the Vienna Convention on the Law of Treaties has shown, a convention may not be ratified, although all save one of the rules of the treaty are acceptable to the state. This nonratification does not mean that the state would not be willing to act according to the rules of the treaty in all respects except those covered by the one objectionable provision. Thus, the nonratification of a treaty does not mean that each and every rule in the treaty is rejected by the state.

Therefore the sole difficulty in the adoption of the hypothesis that there were treaty relations between Greece and Italy is a formal one—that the two states ratified the identical provision but in two different instruments. Although Article 2 of the Vienna Convention on the Law of Treaties<sup>10</sup> provides that a treaty need not necessarily be incorporated in one docu-

<sup>8</sup> Statute of the International Court of Justice, Art. 38, para. 1.

<sup>9</sup> North Sea Continental Shelf Cases, [1969] ICJ 3.

<sup>10</sup> Done at Vienna, May 23, 1969, UN Doc. A/CONF.39/27 (1969), 63 AJIL 875 (1969).

ment and may be formed by two or more documents, Article 2(a) requires a formal relationship between the two documents, which is lacking in the present case.

But the customary international law of treaties is not as formal as the Vienna Convention. The Vienna Convention, which is prospective in its operation, has set up rigid rules with the sound purpose of assuring that there will be no doubt about the existence or nonexistence of a treaty in future. Article 2 of the Vienna Convention does not exclude the operation of all other customary international law on the conclusion of treaties—such as oral treaties or agreements concluded by means of signs (for example, the raising of flags in the case of a cease-fire). Under that body of law, if there is a conformity of treaty norms, then a treaty must exist between the two parties.

The negation of a treaty relationship seems to be the worst possible solution of the problem. All material arguments are in favor of an obligation, whereas the difficulties in establishing such an obligation are only formal ones. The two governments have accepted one and the same solution of a problem of international law and have in effect declared that this will be the law binding on both nations, subject to reciprocity by the other state involved.

Thus while at first impression the *Heleanna* case seems similar to the *Lotus* case, the legal problems are quite different. The *Heleanna* case may actually mark a new stage in the development in the law of treaties.

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#### A NOTE ON THE CHINESE VIEW OF UNITED NATIONS FINANCES

Several little noticed decisions of the United Nations in recent years regarding its most prominent new member, the People's Republic of China, have raised anew old questions about UN finances. The Chinese attitude towards UN financial obligations, indeed, has implications for several important problems of international law that cannot be treated at length here. Such problems would include the succession of states to international obligations, in this case the obligations of a predecessor regime at the United Nations.<sup>1</sup> A second theme is simply that of the state of disarray in which UN finances have been since the increasing indebtedness arising from the UN Emergency Force (UNEF) and the UN Operation in the Congo

<sup>1</sup> H. Chiu, *Succession in International Organizations*, 14 INT. AND COMP. L. Q. 83-120 (1965); L. C. Green, *Dissolution of States and Membership in the United Nations*, 32 SASKATCHEWAN L. R. 93ff. (1967); K. P. Misra, *Succession of States: Pakistan's Membership in the United Nations*, 3 CANADIAN Y.B. OF INT. L. 281-89 (1965).



(ONUC).<sup>2</sup> But lastly, it can also be seen that the Chinese have found a new way to inject politics into UN finances in a manner perhaps beneficial to the future of the organization.

The Chinese attitude toward succession to international obligations would not have arisen if the delegation from the Republic of China had paid its debt before leaving town. But like a husband turned out of the house, the Nationalist Chinese delegation left behind debts for the wife, amounting to approximately \$40 million. Chinese representation at the United Nations was changed by General Assembly resolution 2758 of October 25, 1971, when the United Nations "restored the rights" of the People's Republic of China. The Taiwan Government had seen the move coming and had not bothered to pay its assessments for some time. The actual debts of the Taiwan delegation were \$18,207,518 to the UN regular budget, \$5,274,570 to the UNEF account, and \$6,687,207 to the ONUC account. The total, if one wants a sense of proportion, was \$4.6 million more than the 1970-71 assessments for China, which meant that China was slated to lose its voting rights under Article 19 of the Charter.<sup>3</sup>

The delegation from the People's Republic of China, however, saw no need to cover the debts of the previous delegation. It was willing to pay the 1971 assessment, as adjusted proportionately for the period following October 25, since that was the date the General Assembly approved the credentials of the Peking delegation. Without expressing judgment on the remainder of the debt, the General Assembly accepted that contribution from the Chinese, promptly paid in full. The Committee on Contributions, faced with a \$40 million bad debt and unwilling to offend a newly-arrived power in the United Nations, chose to postpone action by asking the General Assembly to find a solution.<sup>4</sup>

The solution found by the General Assembly at the end of its 27th session was to create a "special account" for the Nationalist Chinese debts, to allow for the amount to be "computed as part of the short-term deficit" of the United Nations.<sup>5</sup> In that way, its ultimate disposal was left to later imaginations. The debts of the Chinese to the Regular Account, UNEF, and ONUC were all counted as separate "special accounts." Thus the books of the United Nations carried the hold-over debt through the 28th and 29th sessions, and it still awaits a permanent solution.<sup>6</sup>

The only events that might form a precedent for the handling of the Chinese debt problem was the solution found for Indonesia when it re-

<sup>2</sup> See, for instance, R. B. Russell, *United Nations Financing and "the Law of the Charter,"* 5 COLUMBIA J. OF TRANSNATIONAL L. 68ff. (1966); L. T. Lee, *Alternative Approach to Article 19*, 59 AJIL 872-76 (1965); and R. I. Fine, *Peace-keeping Costs and Article 19 of the UN Charter*, 15 INT. AND COMP. L. Q. 529-39 (1966).

<sup>3</sup> GAOR, 27th Sess., *Report of the Committee on Contributions*, Supp. 11, at 8, UN Doc. A/8711 (1972).

<sup>4</sup> *Ibid.*

<sup>5</sup> GA Res. 3049C (XXVII), Dec. 19, 1972, in GAOR, 27th Sess., *Resolutions*, Supp. 30, at 108, UN Doc. A/8730 (1972).

<sup>6</sup> As can be seen in GAOR, 29th Sess., *Financial Report and Accounts*, Supp. 7, UN Doc. A/9607 (1974).

sumed full participation in the United Nations in 1966.<sup>7</sup> Indonesia had publicly withdrawn from the United Nations on January 20, 1965, but the Secretary-General chose to consider that situation a temporary state of affairs, not a permanent ending of Indonesian membership. Thus with the downfall of Sukarno's government in 1966 and the eventual decision of his successor, General Suharto, to participate in the United Nations, the Secretary-General, with the approval of the General Assembly, decided that Indonesia had never lost its membership. It clearly had not paid its dues for the period of its absence and, in fact, had left a debt for the pre-1965 period. Through negotiation by the Secretary-General, accepted by the Fifth Committee of the General Assembly, Indonesia was forgiven its debts for the time of its absence (January 20, 1965 to September 28, 1966).<sup>8</sup> The Indonesian Government simply agreed to pay the back dues, \$9,204 for 1965 and \$25,809 for previous years, along with its new assessment as dated from September 28, 1966 (\$129,234). The two interpretations of the Secretary-General would appear to be at odds, in that Indonesia did not lose its membership but did not have to pay the assessments levied on it during its "absence." Whether legal or not, the solution was clearly the simplest one politically.

The usefulness of the Indonesian precedent would clearly depend upon whether one was using political or legal reasoning to understand the Chinese situation. In the case of Indonesia one regime succeeded another, and the new regime was willing to accept the old debts only to the extent that Indonesia had actually participated in the United Nations. In the Chinese case, one regime succeeded the other, but the two governments represent two separate geopolitical realities. Each Chinese regime may assert sovereignty over the whole Chinese territory (mainland and Taiwan), but some brave observers assert that the day may dawn when the two Chinas accept separate seats at the United Nations. When Taiwan chooses to apply for admission and is accepted for membership, the issue of the back debts could presumably be raised.

The second chapter of the Chinese finances at the United Nations occurred shortly after the PRC delegation had taken its seat. The Chinese first asked for and obtained a seat on the Committee on Contributions. The Chinese then asked for a change in assessment from 4% to 5.5%.<sup>9</sup> Normal human behavior does not include volunteering to raise one's own taxes, whether on the individual level or the state level. But the Committee on Contributions, not being composed of representatives willing to look a gift horse in the mouth, promptly accepted. Without in any way questioning the legality of such a move, this observer considers it impor-

<sup>7</sup> See Egon Schwelb, *Withdrawal from the United Nations: the Indonesian Intermezzo*, 61 AJIL 661 (1967).

<sup>8</sup> See the report by the Secretary-General UN Doc. A/C.5/1097 or GAOR, 21st Sess., *Addendum to the Report of the Committee on Contributions*, Supp. 10A, at 3, UN Doc. A/6310/Add.1, (1966).

<sup>9</sup> GAOR, 28th Sess., *Report of the Committee on Contributions*, Supp. 11, at 16, UN Doc. A/9011 (1973).

tant to explore the motives of the Chinese, to see what elements of a Trojan horse lurked in that gift horse. Unusual financial moves often have interesting legal and political implications.

Some talk in the UN corridors attributed the Chinese generosity to the move in 1973 to make Chinese a working, as well as an official, language of the General Assembly and the Security Council.<sup>10</sup> Such speculation, in fact, probably conceded to the Chinese more logic than was warranted. Two languages were newly adopted as working languages at the 28th session: Chinese and Arabic. Upon giving Arabic this important status, the United Nations also persuaded the Arab states to agree to pay the additional costs for the first three years (1974-76).<sup>11</sup> No such agreement was made with regard to Chinese, which was admittedly of a different status, as it had been an official, but nonworking, language of the United Nations since 1945. But the provision of Chinese language facilities would cost the United Nations over \$1,000,000 for 1974-75, and yet there was no mention in any documentation of a Chinese willingness to cover such costs.<sup>12</sup>

Following this speculative line of logic, however, one has to assume that the Chinese had therefore decided to cover the costs to the United Nations implicitly by raising their percentage from 4% to 5.5%. Such a change will yield to the United Nations not a mere \$1,000,000 in increased Chinese assessments, however, but approximately \$6,000,000 additional in 1974-75. Generosity of such a magnitude makes one look for equally grand explanations that encompass more than the costs of using the Chinese language at the United Nations. Such explanations can be compressed into three main possibilities.

(1). The Chinese may have recognized an obligation to pay off the old Nationalist debts and wanted to find an indirect method of doing so. It may be that the Chinese thought that by raising their annual assessment, they could pay the \$40 million on the installment plan. The immediate answer to such a suggestion, of course, is that from the point of view of the United Nations, the percentages of members' assessments merely changed. The United Nations would receive no more money in an absolute sense. Then did the Chinese hope that the other members who saved money as a result of the Chinese move would perceive the Chinese motives and voluntarily contribute to the effort of retiring the short-term deficit? No such response occurred, even though the assessments of nearly all UN members were reduced at the 28th session. Thus such an explana-

<sup>10</sup> Shannon, "Peking Offers to Raise UN Contribution—With a Catch," *Los Angeles Times*, Oct. 10, 1972, at 1, in 2 J.A. COHEN AND H. CHIU, *PEOPLE'S CHINA AND INTERNATIONAL LAW: A DOCUMENTARY STUDY* 1363 (1974).

<sup>11</sup> GA Res. 3190 (XXVIII), Dec. 18, 1973, in GAOR, 28th Sess., *Resolutions*, Supp. 30, at 124, UN Doc. A/9030 (1973) and Advisory Committee on Administrative and Budgetary Questions, 28th Sess., *30th Report*, Supp. 8A, at 135, UN Doc. A/9008/Add. 30 (1973).

<sup>12</sup> See Advisory Committee on Administrative and Budgetary Questions, 28th Sess., *Sixth Report*, Supp. 8A, UN Doc. A/9008/Add. 5 (1973).

tion may not have much value, except to those states that understand the ideological point being made by the Chinese. Such states are few, indeed.

(2). Perhaps the Chinese simply wanted to demonstrate their increased importance in the world and felt that 5.5% was a significant number. There have been efforts in the United Nations to identify the least endowed states, and they have been accorded the assessment figure of 0.04%. But there has been no comparable effort on the high side. The lowering of the American contribution to 25% was certainly symbolically important and the Chinese may have felt that there was an equal importance attached to the figure above 5%. That figure, however, still left the Chinese in a position significantly below that of the imperialist powers of France, Germany, and Great Britain. Relative to the developing world, it must be admitted, the figure of 5.5% is the highest, and might fulfill the Chinese desire to lead, in a symbolic way, the underprivileged people of the world. So there may be some validity to such a view.

(3). The Chinese clearly attached some importance, however, to the figure of 5.5%, and the most reasonable explanation would appear to lie in Asian international politics. At the time the Chinese joined the Committee on Contributions, the only state paying a contribution close to 5.5% was Japan, which had an assessment of 5.4%. The Chinese are continually sensitive to the power of Japan, in both real and symbolic terms, and clearly appear to have sensed a rivalry in terms of paying a lower assessment to the United Nations. China had no obligation to pay more, because of its lower per capita income, but to demonstrate its leadership position in Asia asked that its contribution be raised. It must be emphasized, however, that China was not simply playing king of the mole-hill; the Chinese see significant restructuring of the United Nations ahead, and they want to be sure that China is recognized as "the power" in Asia. Much speculation has occurred, for instance, with regard to changes in the composition and membership of the Security Council. The Chinese, like everybody else, have little idea what criteria might be used to allocate seats on such a new body. If such seats are allocated on a regional basis, the Chinese want to be sure they obtain the Asian seat. The power of the United States in the United Nations from 1945 to 1960 may not have actually derived from its large contribution, but the correlation does exist. Such a relationship is not lost on the Chinese.

The spirit of such gift giving by the Chinese has apparently not caught on with other states. It may not even become the panacea for the finances of the United Nations, but it does raise a number of questions. Does such a Chinese step presage a move toward a "realist" demand that power be related to contributions to international organizations? Are the Chinese so bound up in symbolic politics that the numbers on a list of assessments become a point of pride? Does the contribution, and the presumed precedence over Japan, indicate that the Chinese do want regional representatives as permanent members on a new Security Council? Such questions will not be answered in the next few years, since the Chinese gamble in

raising its own assessment did not pay off. When the final list of assessments was compiled in late 1972, only a few states besides China had their assessments raised, and one of them was Japan. Many factors are included in computing the assessments, and the change in Japanese GNP clearly was a factor in changing its assessment from 5.4% to 7.15%. The Chinese could hardly then come back with an offer of 7.2%. It left the Japanese ahead of the Chinese by more than 1.5%. Competitive gift giving clearly needs more careful planning.

Chinese attitudes toward the future of the United Nations thus remain somewhat ambiguous. China's policy on UN finances cannot be understood from public statements, and so actions will have to serve as indicators. In that case, it appears that the Chinese have found a new way to politicize UN finances in a manner that could prove to be more beneficial than harmful.

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#### AVAILABILITY OF DIPLOMATIC RECORDS

The diplomatic records of the Department of State are open to all researchers in the National Archives through the year 1947. This "open period" is moved up as the principal documents are declassified and published in the series "Foreign Relations of the United States." How does this compare with the practice of other Foreign Offices around the world?

Since 1961 the Historical Office of the Department of State has made periodic surveys of the public availability of diplomatic archives throughout the world and has published the results in the form of a mimeographed publication for the use of interested scholars and institutions. These surveys were compiled primarily on the basis of reports supplied by American diplomatic missions abroad which made pertinent inquiries about the policies and practices of the governments to which they were accredited. In a few cases where the information could not be obtained through diplomatic channels, it was supplied from published sources or through knowledgeable individuals. The current version of this survey was compiled toward the end of 1974 on the basis of information received and collected throughout that year. Copies in limited number are available and may be obtained by writing to the Director, Historical Office, Bureau of Public Affairs, Department of State, Washington, D.C. 20520.

The general conclusions reached as a result of this survey indicate that 80 of the 124 countries surveyed—a large majority—have no publicly stated or generally applicable provisions for access to their diplomatic records. While a limited number in this group of countries definitely prohibit public or scholarly access to their records, many others adhere to a practice whereby foreign ministry officials or archival administrators may admit on

a case-by-case basis selected individuals or categories of researchers to records relating to specific subjects or periods.

Furthermore, it emerges from this survey that 20 countries have adopted a policy of opening their records, at least in principle, after a lapse of time which in most cases extends from 50 to 75 years. Even among most of those countries, however, access to records is not granted automatically but may be subject to approval of a specific application and may entail review of the notes or manuscript. On the other hand, several countries in this group follow the practice of making records available after less than 50 years have passed, subject to certain restrictions aimed at limiting the subjects of research and/or the categories of researchers.

Finally, 24 countries open their records after a period of less than 50 years. Quite a few of these actually adhere to a 30-year rule for opening their documents. In this group are Australia, the Federal Republic of Germany, Great Britain, and the Netherlands. Some of the countries which generally keep their records restricted for 30-50 years have made an exception by opening some or substantially all of their records for World War II and the early postwar period. In addition to the United States, this group includes Australia, Austria, Canada, the Federal Republic of Germany, Great Britain, Iceland, and Yugoslavia. A note of caution ought to be sounded, however, with regard to certain countries which appear to follow the most liberal access policies. First, some of the ostensibly most liberal provisions, *i.e.*, those envisaging an open period after 20 or 25 years have been adopted by new countries which have not been in existence long enough to have produced records which could now be opened under these provisions. Second, these rules allowing for opening the files after 20 or 25 years often do not cover sensitive or classified documents.

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## CORRESPONDENCE

TO THE EDITOR-IN-CHIEF

*Arab Oil and the  
Middle East Conflict*

In his article entitled "The Illegality of the Arab attack on Israel of October 6, 1973," published in the April 1975 issue of this *Journal*, Professor Eugene V. Rostow has effectively and comprehensively refuted the thesis advanced by Dr. Ibrahim F. I. Shihata, Legal Adviser to the Kuwait Fund for Arab Economic Development, in part II of his article "Destination Embargo of Arab Oil: Its Legality under International Law" (published in the October 1974 issue of the *Journal*, p. 591 ff.). Permit me, Sir, to add some comments on Dr. Shihata's article.

In the introductory part of his article, Shihata repeats the standard Arab argument that the "Jewish State" suggested in General Assembly resolution 181(II), November 29, 1947 "was to cover an area of about 5,655 sq. miles, compared to about 907 sq. miles owned by Jewish settlers and agencies at the time and to about 10,249 sq. miles which formed the total area of Palestine under British Mandate." (Shihata, p. 591, n. 1). He also makes similar computations with regard to the territory within Israel's armistice lines between 1949 and 1967.

Quite apart from the fact that such calculations seem to confuse the question of *sovereignty* over land ("*imperium*" of Roman law) with that of *ownership* over it ("*dominium*"), they are also likely to convey the misleading idea (and this, apparently, is their purpose in Arab propaganda) that five-sixths of the territory of the proposed "Jewish State" and eight-ninths of the territory actually controlled by Israel between 1949 and 1967 were Arab lands. However, what this Arab version conveniently omits to state is the fact that about 50 percent of the territory of Mandatory Palestine and about 70 percent of the territory allotted to the "Jewish State" included the Negev (with approximately 4,500 sq. miles) which was government land. Known as Crown or State Lands, this was—and still is—mostly uninhabited arid and semiarid territory which had originally been inherited by the British from Turkey and then in turn passed in 1948 to the Government of Israel (*see* Government of Palestine, *Survey of Palestine*, 1946, p. 257). These lands had not been owned by Arab farmers, or, for that matter, by any farmers, either under the Mandate period or under the preceding regime.

Shihata also fails to mention the fact that the General Assembly resolutions affirming the rights of Arab refugees to return to their homes (Shihata, p. 591, n. 2) have consistently spoken of those refugees "wishing to return to their homes and *to live in peace with their neighbours.*"<sup>1</sup>

<sup>1</sup> Paragraph 11 of General Assembly resolution 194(III), December 11, 1948; emphasis added. Reference to this resolution has been made in the subsequent annual resolutions of the General Assembly on the Arab refugee problem. It appears that the requirement linking the return of refugees to their homes with their willingness to live in peace with their neighbors was first dispensed with by the General Assembly in its resolution 3236(XXIX), November 22, 1974, following the appearance before it of Yasser Arafat the preceding week.

In discussing the legal effects of Security Council resolution 242 of November 22, 1967, Shihata maintains that whatever doubts may have existed in the past regarding the binding character of that resolution, have now been dispelled by Security Council resolution 338 of October 22, 1973, which "calls upon" the parties to start immediately the implementation of resolution 242 in all of its parts. He believes that the language "calls upon" is sufficient evidence of the binding character of a Security Council resolution (*see* Shihata, p. 603). As is well known, until 1971 the general view prevailed that Security Council resolutions adopted under Chapter VI of the Charter were of a merely recommendatory character. However, in its controversial advisory opinion on Namibia of June 21, 1971, the International Court of Justice ruled that "the language of a resolution of the Security Council should be carefully analysed before a conclusion can be made as to its binding effect. . . . The question is to be determined in each case, having regard to the terms of the resolution to be interpreted, the discussions leading to it, the Charter provision invoked and, in general, all circumstances that might assist in determining the legal consequences of the resolution of the Security Council" ([1971] ICJ 4, at 53).

Even if one accepts the Court's contextual approach, it is still difficult to see how the language "calls upon" in itself could be indicative of the binding character of a Security Council resolution. This language is, to say the least, ambiguous and open to different interpretations. After all, the language "calls upon" frequently occurs in purely recommendatory General Assembly resolutions. To give but one example: General Assembly resolution 2533(XXIV) of December 8, 1969 "calls upon" the members of the Special Committee set up to consider the principles of international law concerning friendly relations "to devote their utmost efforts to ensuring the success of the Committee's session," this clearly being a hortatory provision.

The deference towards General Assembly resolutions displayed by Shihata throughout his article apparently does not extend to the original partition resolution of November 1947. One would be interested to learn what Shihata's evaluation is of the Arab rejection of that resolution and the subsequent attempts to thwart it through violence and military intervention. After all, it was Arab defiance of that resolution (which was accepted by the Jewish side at the time, on condition of reciprocity) that lies at the root of the four wars and all the bitterness and suffering (including that of the Arab refugees) that have bedevilled the Middle Eastern scene ever since. A selective respect for UN decisions is therefore, to put it mildly, legally curious. The steamrolling in recent years in the General Assembly of pro-Arab resolutions adopted by the votes of the Arabs, the Soviet bloc, and their supporters is not indicative of any legal conviction of the international community, as is suggested by Shihata. A much more plausible explanation of this phenomenon is that it reflects the parliamentary situation within the United Nations itself which counts among its members 20 Arab States but only one Jewish State. To this should, of course, be added that the greater part of the known oil deposits in the world is found not under the ground of Israel but of the Arab States.

Shihata is not unaware of these geological realities: in his introductory remarks he rightly states that "production of oil beyond certain limits did not make economic sense for many Arab countries. Their depleting crude was increasingly converted into depreciating dollars and pounds yielding in fact a lower economic return than that achieved by simply keeping it in the ground. Worse still, this conversion was taking place in countries with



few alternative resources and with a rather limited absorption capacity for generated funds" (Shihata, p. 591). It would be difficult to state the true character of the Arab oil embargo problem in more precise and concise terms. So stated, it becomes clear that the Arab-Israel conflict is used as a convenient pretext to disguise the true state of affairs. The arguments advanced by Shihata are thus revealed to be the legal "*Ueberbau*" for a situation that, from the analytical point of view, merits separate treatment and consideration.

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TO THE EDITOR-IN-CHIEF

*The Arab Oil Weapon—A Mild  
Response to A "Skeptic"*<sup>1</sup>

The fundamental jurisprudential question that Mr. Smith did not openly address is whether the UN Charter and its stated purposes and principles are a part of "law" or are merely "moral" principles devoid of legal significance. This leaves aside a further question: whether patterns of shared "moral" perspectives are, indeed, legally relevant (see H. L. A. Hart, *The Concept of Law* 7-8, 16, 56, 181-207, *passim* (1961)). You have Mr. Smith's answer; you have ours. But let us be more precise.

It was John Austin and the early "positivists" who said that both constitutional and international law are merely forms of "positive morality." All of us are probably aware of the Austinian hesitation to call international law "law." As Hart observed, "it is quite obvious why hesitation is felt . . . International law lacks a legislature, states cannot be brought before international courts without their prior consent, and there is no centrally organized effective system of sanctions" (*id.* at 3).

Nevertheless, through time most have come to recognize that international "law" does exist. And almost all seem to agree that the UN Charter, as a primary treaty (see Charter, Art. 103), constitutes an important part of international "law." We simply do not agree that our consideration of Charter terms and principles and authoritative UN resolutions which are useful for measurement of community consensus as well as authoritative interpretations of Charter provisions constituted a mere "moral appeal to 'goal-values'." As any honest reading of our article discloses, the statement actually made refers to "legal policies (goal-values)" and not to "moral" values (transcendental or otherwise). Further, the critical concern was not the "inquiry into Arab motivations" as such, but the content of the UN Charter.

Moreover, we do not consider it to be "politically" realistic to equate "law" with, at one extreme, raw power (naked force) or, at the other, a world government. Even in a highly organized social process, the fact that several murderers walk the streets without sanction does not mean that there is no law against murder or that such a law has not been violated.

That there is no world government with effective power to enforce all laws, we concede. That there is no world court to provide effective legal "sanction" of all violations of international law, we concede. That the United States might, someday, have to use military force to sanction relevant violations of international law, we reluctantly concede. But that might

<sup>1</sup> See Stephen N. Smith, *Re "The Arab Oil Weapon": A Skeptic's View*, 69 AJIL 136 (1975), commenting on Jordan J. Paust and Albert P. Blaustein, *The Arab Oil Weapon—A Threat to International Peace*, 68 AJIL 410 (1974).

equals right we shall not concede. That patterns of power are themselves the patterns of law we do not concede. That goal-values specifically articulated in Articles 1, 2, 55, and 56 of the UN Charter, as supplemented by authoritative General Assembly and other Declarations, are merely "moral" values, not now but for the future, we emphatically deny. That the Arab oil weapon was not a "forceful violation of . . . political independence" of several states and peoples around the globe, or that "force" includes only *armed* coercion, we emphatically deny and our article shows otherwise. That it is "strained" or politically unrealistic to regard the oil weapon as a threat to political independence, human rights to food and economic development, self-determination, friendly relations, respect for law, sovereign equality, fundamental freedoms for all without distinction as to race or religion, and more seems, itself, politically, economically, and legally unrealistic. One cannot approach this matter objectively, consider the proportionality and effects of the oil weapon as documented in our own article and elsewhere, and consider actual patterns of subjectivity and control, and reach any other conclusion but that our approach is legally, economically, and politically "realistic" by its very insistence upon comprehensive inquiry into law and context.

Further, that there is anywhere in the Charter or relevant legal policy a distinction between "boycott" and "embargo" of "decisive importance," or any importance here, we deny—and we note that Dr. Shihata's article<sup>2</sup> refers to the oil "embargo." That we have ever asserted that the oil weapon "need not be identified with any existing legal concept" is inaccurate. That rational, realistic approaches to legal decision would ever allow the complete ignoring of "whatever else the Arabs may have done," including a concomitant and joint "resort to arms," is one camel that's too hard for anyone to swallow.

And further, that one cannot establish "directly and in specificity" that the Arab oil weapon violated Article 2(4) of the Charter, we deny with our own published work. That there are no "rules" laid down by "legislative or judicial" bodies that justify our "interpretations," we deny—in fact, we feel that there is *none* which opposes our primary assertions. Additionally, that "those with responsibility in the most important nation-states of the world" view the Arab oil weapon as a lawful employment of transnational coercion, we cannot at all agree. In fact, we challenge Stephen Smith, or anyone else, here or in the *Columbia Journal of Transnational Law* (where our reply to Dr. Shihata will appear), to prove that our specific and detailed consideration and "interpretations" of Charter law and basic human rights are "so far removed from the current practice of nation-states" and/or the "preponderant view" of world leaders, world jurists, world "legislators" and documented human expectation that they lack significant legal import. We have no documentation in Mr. Smith's letter of such assertions—no documentation as well of the stated relevance of the California Supreme Court decision in *Sei Fujii* (especially given *Oyama v. California* and other U.S. decisions) or "cases like *Sabbatino*," which may be considered to be "dead."

Finally, contrary to the implications in his letter, a "skeptical, but objective, political realist" would not even have to read our article to realize that the oil weapon has, itself, constituted a substantial threat to "cooperative action" and to world law and peace. New "agreements" with certain Arab governments and other states, in fact, seem highly suspect under such "cooperative" policy articulations as those found in Articles 51 and 52 of

<sup>2</sup> Ibrahim F. I. Shihata, *Destination Embargo of Arab Oil: Its Legality under International Law*, 68 AJIL 591 (1974).

the Vienna Convention on the Law of Treaties. To criticize our article as a primary contributor to the ongoing political, economic, and military confrontation (and some speak of economic warfare) would, we humbly suggest, seem itself to be highly unrealistic.

JORDAN J. PAUST  
ALBERT P. ELAUSTEIN

TO THE EDITOR-IN-CHIEF

I read with interest the review in the October 1974 issue of the *Journal*<sup>1</sup> of the recently published volume of documents and scholarly writings regarding the South West Africa/Namibia dispute.

The review states that the publication contains "extracts from the 1946-47 debates in the South African Parliament which seem to demonstrate that Prime Minister Smuts acknowledged, at least at that time, an obligation to submit reports regarding the administration of the mandate to the United Nations"; and goes on to say that "this material might have strengthened considerably Applicants' arguments regarding the right of the United Nations to exercise supervisory authority over South West Africa."

The fact is that the Applicants did bring to the Court's attention ample acknowledgment by South Africa concerning its duties to report to the United Nations and the fact that in 1947 it did report. (Memorial of Ethiopia and Liberia, 1 Southwest Africa cases, ICJ Pleadings 32 at 44-45 and 211 (1966).) This was probably not even necessary since the Court's previous Advisory Opinion on Southwest Africa had already included a reference to such an acknowledgment and, as a major part of its Opinion, had characterized it as constituting "recognition by the Union Government of the continuance of its obligations under the mandate and not a mere indication of the future conduct of that Government." (International Status of South-West Africa, Advisory Opinion: [1950] ICJ 128 at 135). (At the time the Applicants brought their action, the Court had already specifically ruled in its Advisory Opinion, it will be recalled, that South Africa, in its role as Mandatory, was subject to supervision to be exercised by the United Nations, to whom it had a duty to report.)

The fact of the matter is, of course, that the Court never decided on the Applicants' submission concerning the duty of South Africa to report. Having previously found jurisdiction, the Court in the "merits," decided, in fact, not to rule on the merits but instead in effect reversed its decision on jurisdiction on the ground that Members of the League had not had, and therefore the Applicants in any case did not have, any legal right or interest in claims concerning South Africa's general exercise of the mandate, including its duty to report. This was done despite the Applicants' citing of previous admissions by South Africa at the United Nations and at the Court during arguments preceding the Advisory Opinion that Members of the League had had precisely such a right or interest (ICJ Pleadings, *supra* 417 at 440, 469, and 470-71).

Ten wheelbarrows full of added scholarly material and hundreds of more hours in the library would not have made any difference. The composition of the Court changed between the time it rendered its decision on jurisdiction and the time it rendered its decision on the "merits." The former minority on jurisdiction became, with the help of the casting vote of the Court's President, the new majority, and the Court reversed itself.

<sup>1</sup> Slonim, *The South West Africa/Namibia Dispute* by John Dugard, 68 AJIL 784 (1974).

(The writer of this letter was one of Counsel for the Applicants during the jurisdictional phase. Accordingly, I have to say that this letter presents my own viewpoint and not necessarily the viewpoint of anyone else.)

LEONARD S. SANDWEISS

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*Rejoinder to Mr. Sandweiss*

Mr. Sandweiss, it would appear, has not closely examined the material which Dugard uncovered and to which I refer in my review. This is to be regretted since the significance of the new evidentiary material becomes apparent only when it is compared to what was actually laid before the 1950 and 1960 Courts on the point in issue—namely the transference of supervisory authority over mandates from the League to the United Nations.

Contrary to Mr. Sandweiss's assertion, the 1950 Advisory Opinion on the International Status of South West Africa in no way found that South Africa had ever conceded an obligation to submit reports on the mandate to the United Nations in lieu of the League. The 1950 Court only found that South Africa's actions confirmed the continued existence of the mandate as an institution; there was no evidence of South African recognition of a transfer of supervisory authority over the mandate from the League to the United Nations.<sup>1</sup>

Only in 1962, in the jurisdictional phase of the *South West Africa* cases did the Court go beyond the 1950 pronouncement and declare that South Africa's statement (delivered to the final session of the League Assembly) constituted "recognition . . . of the continuance of its obligations under the Mandate." The strength of the evidentiary material relied upon by the majority was vigorously challenged by Judges Spender and Fitzmaurice in their joint dissent. It is in this context that the material uncovered by Dugard is so pertinent since he quotes Prime Minister Smuts in 1946 acknowledging before the South African Parliament that reports on the mandate formerly due to the League are henceforth to be submitted to the United Nations (Dugard 102, 114-16). (Indeed he even acknowledges that "the people of the territory can send petitions to UNO.")

This material would have belied the oft-repeated claim of counsel for South Africa that at no time had any South African government acknowledged the right of the United Nations to supervise the South West Africa mandate. At least on this one occasion the Smuts government did acknowledge such supervisory authority. As I stated in my review, this crucial piece of evidence could have strengthened the Applicants' case (on this one point) considerably. Certainly they should not have failed to bring it to the attention of the Court.

SOLOMON SLONIM

<sup>1</sup> See in this regard, SLONIM, *SOUTH WEST AFRICA AND THE UNITED NATIONS* 115-16, n. 22 and 198, n. 45 (1973).

# CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

*Eleanor C. McDowell \**

The references in the headings are to sections of the *Digest of United States Practice in International Law* (1973) dealing with the same subject matter as the material presented.

## RIGHTS AND DUTIES OF STATES

### *Nonintervention in Internal Affairs* (US *Digest*, Ch. 2, §6)

On February 24, 1975, the Department of State released the text of a letter from Secretary of State Kissinger to William A. Eteki Mboumoua, Secretary-General of the Organization for African Unity, protesting interference by the Organization in a matter of internal domestic concern to the United States. At a meeting the previous week, the Council of Ministers of the Organization had adopted and released to the press a consensus resolution commenting adversely on the nomination of Ambassador Nathaniel Davis as Assistant Secretary of State for African Affairs. The following is an excerpt from Secretary Kissinger's letter:

The selection of senior officials for posts in the United States Government is a function of American sovereignty. Unlike the established procedures for accrediting Ambassadors for whom agreement is sought, the selection of Assistant Secretaries of State remains a purely internal, domestic concern. The United States Government would never comment publicly upon the choices of other sovereign governments in filling any of their public offices. Under commonly accepted principles of international decency it has the right to expect the same of other governments, particularly of those whom it has regarded as friends. You will understand . . . the depth of my dismay in learning from the press of this unprecedented and harmful act of the Council.<sup>1</sup>

## TRUST TERRITORIES

### *The Trust Territory of the Pacific Islands* (US *Digest*, Ch. 2, §6)

On February 15, 1975, a Covenant to Establish a Commonwealth of the Northern Mariana Islands in Political Union with the United States of America was signed at Saipan by representatives of the United States and the Northern Mariana Islands.<sup>1</sup> The signing of this agreement marked the

\* Office of the Legal Adviser, Department of State.

<sup>1</sup> 72 DEPT. STATE BULL. 376 (1975).

<sup>1</sup> The text of the Covenant, the Technical Agreement Regarding Use of Land to be Leased by the United States in the Northern Mariana Islands, and the Report of the Joint Drafting Committee on the Negotiating History may be found in 121 CONG. REC. 4083-91 (1975). For the text of the Covenant, *see also* 14 ILM 344 (1975); UN Doc. T/1759, Mar. 10, 1975.

culmination of negotiations which had begun in December 1972. The agreement will enter into force in part after approval by the Mariana Islands District Legislature and by the people of the Northern Mariana Islands in a plebiscite, constituting on their part a sovereign act of self-determination, and approval by the United States in accordance with its constitutional processes. The Northern Mariana Islands will achieve self-governing commonwealth status under U.S. sovereignty at such time as the Trusteeship Agreement between the United States and the Security Council of the United Nations<sup>2</sup> has been terminated. The United States has informed the UN Trusteeship Council that it intends to terminate the Trusteeship Agreement simultaneously for all parts of the Trust Territory and not for one part separately.

The first step in the approval process was completed on February 20, 1975, when the Mariana Islands District Legislature unanimously passed a resolution which approved the Covenant for submission to the people of the Islands in a plebiscite to be called by the United States. On February 28, 1975, the Mariana Islands District Legislature passed a resolution requesting the United States, as administering authority of the Trust Territory of the Pacific Islands (TTPI), to set a date and call a plebiscite in the Mariana Islands District in order to accord the people of the District the opportunity to express their decision on the Covenant. If approved by the people of the District, the Covenant will be submitted to the U.S. Congress for authorizing and approving legislation.

The United States has undertaken negotiations with the Joint Committee on the Future Status of the Congress of Micronesia, looking toward a future political relationship of free association between the United States and other districts of the Trust Territory.

#### PROTECTION OF HUMAN RIGHTS

##### *General (US Digest, Ch. 3, §6)*

Ambassador John Scali, U.S. Representative to the United Nations, in an address in Washington, D.C. on March 6, 1975, referred to "an important new human rights policy which the United States has adopted" toward UN activities in the field of human rights. He expressed, in particular, new support for UN conventions, as yet unratified by the United States. Excerpts from Ambassador Scali's address follow:

In the early days of the United Nations the United States took a strong lead in drafting the two conventions which would give the force of international law to the freedoms set out in the Universal Declaration of Human Rights. Then, in 1951, we announced that we would not sign either of these treaties. That same year we did sign an International Convention against the crime of genocide, only to let it languish unratified for the past 24 years.

\* \* \* \* \*

I continue to believe that the United Nations can do more to promote human rights and that the United States should play a leading

<sup>2</sup> 61 Stat. 3301; TIAS No. 1665; 8 UNTS 189; entered into force July 18, 1947.

role in stimulating its efforts. . . . To give visible proof of our commitment, I would urge that the current session of the Senate consider action on the 24-year-old Convention on the Prevention of Genocide, as 77 other nations have done before us. I suggest further that we reexamine the other human rights covenants, such as that protecting civil and political rights and the 1969 international treaty against racial discrimination.<sup>1</sup>

*United Nations Structure and Procedures* (US Digest, Ch. 3, §6)

On February 14, 1975, Philip E. Hoffman, U.S. Representative to the UN Human Rights Commission in Geneva, made a significant statement of United States policy regarding UN procedures for considering private complaints of human rights violations. He announced U.S. support for thorough studies by the Commission of alleged human rights violations anywhere in the world, whenever complaints to the Commission indicate a consistent pattern of gross violations, the allegations are reasonably supported by the evidence available, and the violations appear to be continuing. This includes alleged human rights violations within the United States and in nations regarded as friends as well as adversaries.

The Human Rights Commission, at its 31st session in Geneva, February 3–March 7, 1975, undertook to deal for the first time with the thousands of private communications relating to violations of human rights and fundamental freedoms which are addressed annually to the United Nations. Under the procedures established by the UN Economic and Social Council in Resolution 1503(XLVIII), adopted in 1970, such communications were reviewed initially by the Human Rights Commission Subcommission on Prevention of Discrimination and Protection of Minorities, which in turn referred to the Commission for confidential consideration particular situations which appeared to reveal a consistent pattern of gross and reliably attested violations of human rights requiring consideration.

In the public debate, which preceded the consideration of individual country cases in executive session, the U.S. Representative made a statement reading in part as follows:

Perhaps the greatest difficulty which the Human Rights Commission labors under in its delicate and difficult task is the propensity of sovereign nations to be fully—if not furiously—aware of the shortcomings of other countries relating to human rights—but to remain blithely unconscious of their own delinquencies. There seems to be an overwhelming tendency by most governments to express concern only when human rights violations occur elsewhere—and to invoke “domestic jurisdiction” as a barrier to examination of violations within their own boundaries.

Under the procedures laid down in Economic and Social Council Resolution 1503 (XLVIII) nation states will now have the opportunity to cast their gaze inwards—to recognize such human rights violations as occur on a gross and consistent basis within their own boundaries—and to ascertain the degree of international concern with regard to those matters.

<sup>1</sup> Press Release USUN-17(75), Mar. 5, 1975.

And this international concern is justified. It is justified if the existence of the Human Rights Commission is justified—or that of the United Nations itself. Claims that abasement of man, the cruelties or oppressions inflicted upon him, are matters for internal concern only are not appropriate on the part of nations subscribing to the United Nations Charter. And this applies to oppressions ranging from unjustified imprisonment, torture, and restrictions on freedom of speech, of movement, of ideas, all the way up to that most egregious of all violations—*apartheid*. What is the purpose of the Human Rights Commission if this is not the case?

Under the 1503 procedures we do not sit as a court to pass judgments on governments or to apportion blame. Our role is to find the best way to help promote and protect human rights. We hope that the attitude between this Commission and the governments involved in the separate cases which will be before us will be one of cooperative understanding, with a shared concern for the good of the human beings involved, motivated by a common desire to find a way to improve situations with respect to which the evidence appears to reveal "a consistent pattern of gross and reliably attested violations of human rights."

. . . to indicate my government's determination to support these procedures we have decided on the following general policy. When the Subcommittee refers a situation to the Human Rights Commission as revealing a consistent pattern of gross and reliably attested violations of human rights requiring consideration by the Commission under ECOSOC Resolution 1503 and when the situation is reasonably supported by the record before the Subcommittee and is of continuing and current concern, the United States will support a thorough study. The United States support of a study does not imply a pre-judgment on the merits by the United States.<sup>1</sup>

#### THE DEEP SEABED AND THE HIGH SEAS

##### *Domestic Claims (US Digest, Ch. 7, §5)*

On February 25, 1975, Rogers C. B. Morton, Secretary of the Interior, announced the creation of an Ocean Mining Administration within the Department of the Interior to promote and encourage ocean mineral resource recovery from the seabed and subsoil beyond the limits of national jurisdiction. The Ocean Mining Administration is charged with developing policy for deep ocean minerals recovery and implementing a domestic program to provide new sources of nickel, copper, and other minerals from the seabed.

In announcing the new Administration, Secretary Morton underscored the importance of ocean mining to the future raw material needs of the United States. He said: "By 1990 the United States can become a net exporter of nickel, copper and cobalt, if we ensure a healthy, stable investment climate for ocean mining now. This would reduce our present high level of dependence on other countries for several of these metals." The Secretary expressed the hope that in 1975, which he called a critical

<sup>1</sup> Dept. of State telegram 1004 from the U.S. Mission in Geneva to the Secretary of State, Feb. 14, 1975.



year for the ocean miner, the Third United Nations Conference on the Law of the Sea would be concluded successfully. He added:

The Administration, however, mindful of its responsibilities to reduce wherever possible our nation's vulnerability to interruptible or high cost sources of raw materials, will have to be prepared to act through a domestic program to secure our access to ocean minerals. We must create an investment climate which will promote the development of this new minerals frontier while at the same time protecting the ocean environment.<sup>1</sup>

The Ocean Mining Administration, under the direction of the Assistant Secretary of the Interior for Energy and Minerals, is to supervise the conduct of ocean mineral technology and resource assessment programs and oversee responsibilities in the ocean mining field with respect to compliance with the National Environmental Policy Act.

#### OUTER SPACE

##### *Remote Sensing (US Digest, Ch. 8, §6)*

On February 19, 1975, Ronald F. Stowe, U.S. Representative to the Legal Subcommittee of the UN Committee on the Peaceful Uses of Outer Space, made a statement to that subcommittee on the legal implications of remote sensing of the environment of the earth from outer space. Mr. Stowe reiterated the U.S. view that remote sensing activities are clearly within the scope of the 1967 Outer Space Treaty.<sup>1</sup> He also stressed the natural environmental aspects of remote sensing and the importance of an open and widely utilized system of data dissemination, pointing out that such a system is sanctioned and encouraged by presently applicable law. In this connection he criticized two draft texts previously introduced, one by Brazil and Argentina and the other by France and the Soviet Union, which proposed a restrictive data dissemination system. The following is an excerpt from Mr. Stowe's statement:

A preliminary question which can and should be resolved with relative ease is, in short: What are we talking about when we use the term "remote sensing" in these discussions? The United States, having launched the remote sensing experiments from which practical experience and data are currently available to the international community, initially spoke of remote sensing in terms of Earth resources technology. However, both the sensing capabilities of the experiments undertaken and the experience we have gained in the last two years have convinced us that reference only to natural resources is inadequate.

A more appropriate and meaningful definition of "remote sensing" would also include environmental factors, and hence we should speak of remote sensing of the natural environment of the Earth. This term seems more useful for several reasons. First, the experiments which we have undertaken through what were called ERTS-1 [Earth Re-

<sup>1</sup> See Dept. of the Interior Press Release, Feb. 25, 1975, and 121 CONG. REC. S2710-12 (1975).

<sup>1</sup> 18 UST 2410; TIAS No. 6347; 610 UNTS 205; 61 AJIL 644 (1967); 6 ILM 386 (1967).

sources Technology Satellite] and ERTS-B, now renamed Landsat 1 and 2, reveal that equally as important as potential resource identification from outer space are the possibilities for land use analysis, mapping, water quality studies, disaster relief, air and water pollution detection and analysis, protection and preservation of the environment, and many others. To address only one of these potential uses is misleading. All states, including especially developing countries, have broad and sometimes urgent interests in all of these uses.

To refer only to data about resources is also technically unrealistic, because the same data base which gives information about resources gives information about all of these other uses I have mentioned and more. To inhibit access to data about one potential use is to inhibit access to data about all other such uses. The data interpretation which takes place here on the ground after the data are received from the satellite determines the types of information which will be elicited. There are no data from these satellites which are peculiar to or which can be restricted to Earth resources.

The concerns which some states feel about their natural resources are evident and should be addressed in our discussions. However, if we are to attempt to analyze the legal aspects of such remote sensing, our focus and our attention must be broader than just one particular element of that sensing. It is our belief that reference to the concept of remote sensing of the natural environment of the Earth may be a helpful step in that direction.

#### Question of International Law

Agreement on definitions, however important, would still leave a variety of fundamental and difficult substantive questions which one or more members have posed to this subcommittee. Among those questions, even if not expressly asked, is: What is the present state of international law relating to remote sensing of the natural environment? I address this issue not because in our view that law is uncertain or unsettled, but rather because during the last year certain questions have been raised to what we believe are the well-established provisions of international law in this area. We do not believe that these challenges are well founded or that the change in law which they implicitly propose would be desirable.

I refer in particular to the assertion that Earth-oriented sensing activities from outer space are not sanctioned by the 1967 Outer Space Treaty, which provides in part that: "Outer space, including the moon and other celestial bodies, shall be free for exploration and use by all States without discrimination of any kind, on a basis of equality and in accordance with international law. . . ."

As my delegation pointed out at the last session of the Legal Subcommittee, in our view such remote sensing activities are clearly within the scope of that treaty.

The negotiating history of the 1967 Outer Space Treaty indicates that primary interest was evinced in the possibilities of using space technology to improve certain capabilities here on Earth. Certainly, one cannot then reasonably infer that Earth-oriented activities were not covered. Practice, too, confounds such an assertion: for one need not look far to realize that before, during, and after the negotiation of

the 1967 treaty, which we all recognize as the basic authority in this area, Earth-oriented space activities were plentiful and well known.

Telecommunications and meteorological satellites were much more common than and equally as accepted as deep space probes. For example, over 70 countries utilize the U.S. meteorological satellite system on a daily basis. That system is focused on the Earth and sends back daily images of the Earth's surface as well as its cloud cover. The manned Mercury, Gemini, and Apollo programs all contained widely publicized and intensively studied experiments focusing on the Earth, including its resources and environment. I should mention here that this acceptance continues to the present day and that it applies specifically to remote sensing. Fifty-two countries, including 17 members of this subcommittee, plus a number of international organizations have become party to international agreements covering the open use of such remote sensing data for their own interests. They have chosen to do so for important reasons which we must neither ignore nor discard in our own analysis.

#### Benefits of Dissemination of Data

It has been suggested that remote sensing of the natural environment is distinguishable from earlier activities because it allegedly affects the Earth in a way that earlier sensing did not. However, this argument does not withstand serious scrutiny. Sensing of the natural environment for resources, mapping contours, air and water pollution, land use, or any other purpose does not of itself affect the Earth any more than a meteorological satellite changes or affects the cloud formations it senses. If we are to be serious about our work, we must discard these facile arguments and come to grips with the essence of the facts, including the genuine concerns which are before us.

Attempts to inhibit or even prohibit the gathering and exchange and analysis of information about the Earth are misdirected in that they will not solve what seem to be the underlying concerns which generate them. They are counterproductive, in that they could, if pressed, undermine or eliminate the potential for developing extraordinary new benefits which can be meaningfully shared by all peoples in all countries of the world.

An essential tenet of both the Brazilian-Argentine and the French-Soviet drafts, as we read them, appears to be the belief that if each state would have a right to prohibit the dissemination to third parties of data about its territory, then each state would be more secure and better off. We believe that the majority of states, including especially the large number of developing countries, will see the situation differently. Their prime need is to identify what resources they have. They will want equal access to all information about their resources. They will not want it available only to those few countries which operate spacecraft, which in our view would be the result of a restrictive data-dissemination system. The surest and perhaps the only reliable way to protect states from being comparatively disadvantaged or discriminated against is to insure that all states and all peoples have as much opportunity to obtain that data as does any one else.

The total body of information and understanding about the world can grow at a much greater rate with the cooperative efforts of investigators throughout the world, and that growth will benefit in par-

ticular those states which do not have the financial resources to carry on sophisticated sensing programs themselves even within their own territories.

The United States does not make this point to defend our own interests. We expect to have access to and to use data about the natural environment of this Earth in any case. We believe that it is strongly in the interests of other states that we and other collectors of this data share it rather than being in effect asked not to.

### Technical and Organizational Realities

Quite apart from the scientific or political merits or disadvantages of a restrictive dissemination system, such a system does not appear either technically or economically feasible; and hence if such restrictions were universally agreed the result could be the complete negation of virtually any public system for remote sensing of the natural environment of the Earth. We have no capability to separate satellite images along the lines of invisible political boundaries. If in the future some technical means for doing so were discovered, it is still highly improbable that the cost of applying it could be brought down to the level at which it would be economically feasible. As a practical matter—and in the end we must deal with the practical realm—it makes little sense to adopt a restrictive dissemination system unless we are prepared to negate the possibility of any internationally available source of remote sensing data. The United States would oppose such a decision and would consider it most unfortunate and a great mistake if agreed to by others.

Finally, on this point I would note the fact that limiting the data availability to conform to national boundaries, even if it were feasible, would destroy many of the most useful functions of satellite remote sensing systems, functions including the study of ecological systems, water systems, pollution, soil moisture conditions, rift systems, and vegetation and soil patterns, as well as most other objectives of sensing systems such as those undertaken by the Landsat experiments. The most pressing need for such satellite observations involves the acquisition and analysis of large area and global data in order to make it possible to deal with problems which are inherently regional or global in character.<sup>2</sup>

Mr. Stowe concluded by expressing the willingness of the United States to participate actively in efforts to examine whether existing international agreements and guidelines might be improved. He presented a working paper<sup>3</sup> containing a number of provisions reflecting the substance of additional international guidelines for remote sensing that the United States would support, suggesting that these might be endorsed by the General Assembly and recommended to all states engaged in remote sensing of the natural environment.

### *Registration Convention (US Digest, Ch. 8, §6)*

On January 24, 1975, the United States signed the Convention on Registration of Objects Launched into Outer Space. The Convention, which

<sup>2</sup> 72 DEPT. STATE BULL. 419 (1975).

<sup>3</sup> *Id.* at 423. UN Doc. A/AC.105/C.2/L.103.

had been formally accepted by the General Assembly of the United Nations on November 12, 1974 (Resolution 3235 (XXIX)),<sup>1</sup> was opened for signature at the United Nations on January 14, 1975. The Registration Convention is subject to ratification by signatory states and will enter into force upon deposit of the fifth instrument of ratification.

With reference to planned implementation of the Convention by the United States, a memorandum of January 20, 1975, to the Secretary of State from William B. Buffum, Assistant Secretary of State for International Organization Affairs, states in relevant part:

No legislation will be required to implement the Convention. However, Federal regulations may be needed in the future to ensure reporting of nongovernmental launches; to date all launches of objects into Earth orbit or beyond from U.S. territory have been by U.S. Government agencies. The United States has for a number of years been voluntarily supplying to the Secretary-General the same information that is required by the Convention. . . .<sup>2</sup>

#### NATIONAL LEGAL PROVISION FOR PROTECTION OF FOREIGN INVESTMENT

##### *The Overseas Private Investment Corporation (US Digest, Ch. 9, §5)*

*Private Insurance:* On February 19, 1975, the Overseas Private Investment Insurance Corporation (OPIC) announced that a group of insurance companies, other insurers, and OPIC had signed a constitution forming the Overseas Investment Insurance Group to insure and reinsure U.S. private investment abroad against the political risks of expropriation and currency inconvertibility as of January 1, 1975.<sup>1</sup>

The Group is the first of its kind and creates a unique partnership designed to encourage the participation of the insurance industry in the field of political risk insurance, a field traditionally administered by the government. The Group functions as a combined underwriting and reinsurance pool and provides for the issuance of new insurance coverages and for sharing a portion of the risks in OPIC's existing portfolio. OPIC is a member of the Group and acts as a reinsurer for the Group's excess losses.

Although the political risk coverages offered by OPIC include expropriation, inconvertibility of currency, and war, revolution, or insurrection, the Group participates only in insuring the expropriation and inconvertibility risks. The private insurer members at the time of the formation of the Group had subscribed a total of \$6,550,000 of a \$40 million per country first loss pool, with OPIC taking up the balance. The Group has indicated

<sup>1</sup> The full text of the Convention is attached as an annex to GA Res. 3235 (XXIX) and may also be found in 14 ILM 43 (1975).

<sup>2</sup> Dept. of State File No. P75 0042-2203.

<sup>1</sup> See OPIC press release, TS/320, Feb. 19, 1975. The Overseas Private Investment Corporation Amendments Act of 1974, approved August 27, 1974, authorized the gradual transfer by 1980 of OPIC's investment insurance underwriting activities to an association of private insurance companies. P.L. 93-390; 88 Stat. 763; 13 ILM 1521 (1974).

it plans to seek additional insurance company participation for its fiscal year commencing December 1, 1975.

OPIC acts as manager for the Group and provides services for users of the program. The Group is continuing OPIC's practice of issuing long-term policies, in most cases providing twenty years of coverage. Fourteen insurance companies participated in the signing of the Group's constitution.

*Claims:* On January 7, 1975, the Overseas Private Investment Corporation (OPIC) announced that it had reached a settlement of all outstanding issues in connection with International Telephone and Telegraph Corporation's \$95 million political risk insurance claim for expropriation of the Chile Telephone Company.<sup>1</sup> The claim had been denied by OPIC on April 9, 1973, but a commercial arbitration tribunal of the American Arbitration Association had ruled on November 4, 1974, that OPIC was legally obligated to pay an undetermined amount to ITT.<sup>2</sup>

According to Marshall T. Mays, president of OPIC, the settlement was based on the successful outcome of ITT's negotiations with the Chilean Government, which agreed to pay a total package of \$125.2 million for ITT's equity and debt in the nationalized utility.

Under the terms of OPIC's settlement with ITT, the U.S. government agency purchased notes valued at \$35 million from ITT and guaranteed an additional \$59 million of notes issued to ITT by the Chilean Development Corporation (CORFO). OPIC also returned \$4 million in premiums paid by the company since the expropriation.

The notes acquired by OPIC consist of \$17 million in existing obligations of the Chile Telephone Company, guaranteed by the Central Bank of Chile, and the last three years of semiannual notes, amounting to \$18 million, issued by CORFO for payment of ITT's equity in the telephone company.

Under ITT's agreement with Chile, the corporation received \$21 million in cash for past due principal and interest on debt owed by the telephone company to ITT. The remaining \$17 million of this debt, since acquired by OPIC, is to be paid to the U.S. agency over a period of six years in accordance with the original debt agreement. In addition, payment for ITT's equity in the telephone company consisted of a down payment of \$10 million in an interest-bearing letter of credit payable in 1975. The balance of \$77.2 million is payable in notes issued by CORFO, maturing semi-annually between January 1, 1975, through July 15, 1987, and bearing interest at the rate of 10 percent.

Mr. Mays, president of OPIC, said:

The settlement was an equitable one. The \$35 million of notes we are acquiring bear interest at an average annual rate of 8 percent. The funds used to purchase these notes will come out of our insurance reserve which now stands at \$202.2 million. In turn, the payments of principal and interest which are made by Chile to OPIC over the next 13 years, totaling \$58 million will go back into our reserve.

<sup>1</sup> OPIC press release TS/313, Jan. 7, 1975.

<sup>2</sup> See 13 ILM 1307 (1974).

## INTERNATIONAL TRADE

*Trade Legislation (US Digest, Ch. 10, §2)*

Kempton B. Jenkins, Acting Assistant Secretary of State for Congressional Relations, in a letter dated February 12, 1975, to Joseph J. Jasinski, Professional Staff Member of the House of Representatives Banking and Currency Committee, discussed the authority of the President and the Secretary of State in foreign trade matters. The letter outlines the history and legal basis of the trade agreements program, the broadened authority provided by the Trade Expansion Act of 1962<sup>1</sup> including participation of the United States in multilateral trade negotiations under the auspices of the General Agreement on Tariffs and Trade (GATT), and the substantial new authority under the Trade Act of 1974<sup>2</sup> to decrease tariffs and deal with nontariff barriers to trade. The following is an excerpt from Mr. Jenkins' letter:

The term "trade agreements" has often been used narrowly to refer to limited authority delegated to the President by the Congress to negotiate agreements when the President found that existing customs, duties or other import restrictions of the United States or any foreign country were unduly burdening or restricting the foreign trade of the United States. The so-called Trade Agreements Program began with the Trade Agreement Act of 1934 (Section 350 of the Tariff Act of 1930, as amended). The President's authority under the Trade Agreements Program was last renewed by the Trade Agreements Extension Act of 1958, which extended authority, *inter alia*, to reduce duties, until June 30, 1962.

The Trade Agreements Program, as described, was superseded by the Trade Expansion Act of 1962 which authorized the President to enter into trade agreements after June 30, 1962, and before July 1, 1967. The authority prescribed was quite broad in that it permitted the President, for example, to limit the reduction of any rate of duty to 50 percent of the rate existing on July 1, 1962, and, in the case of rates not exceeding 5 percent *ad valorem*, to proclaim duty-free treatment for such items. The Trade Expansion Act provided the statutory basis for United States participation in the "Kennedy Round" of multilateral trade negotiations held under the auspices of the General Agreement on Tariffs and Trade (GATT).

The Trade Act of 1974, which became law on January 3, 1975, provides the President with substantial new authority in the area of trade negotiations. He may, under certain circumstances, enter into trade agreements and, as a result thereof, decrease existing tariffs or harmonize, reduce or eliminate nontariff barriers to and other distortions of trade. This authority may be exercised through both multilateral and bilateral trade agreements. Agreements regarding nontariff barriers are subject to congressional approval. This grant of authority will enable the United States to participate meaningfully in the multilateral trade negotiations (MTN) scheduled to begin in earnest during the next few weeks under GATT auspices. Finally, Title IV of the Trade Act contains a number of limitations on the President's authority to make commercial agreements with nonmarket economy countries,

<sup>1</sup> P.L. 87-794; 76 Stat. 872; 19 U.S.C. §§1801 *et seq.*; 1 ILM 340 (1962).

<sup>2</sup> P.L. 93-618; 88 Stat. 1978; 19 U.S.C. §§2101 *et seq.*; 14 ILM 181 (1975).

including provisions relating to congressional approval or disapproval of such agreements.<sup>3</sup>

*Bilateral Agreements (US Digest, Ch. 10, §2)*

Secretary of State Henry A. Kissinger, at a news conference in the Department of State on January 14, 1975, announced that the 1972 trade agreement between the United States and the Soviet Union "cannot be brought into force at this time."<sup>1</sup> The trade agreement had been signed at Washington on October 18, 1972,<sup>2</sup> and was to enter into force upon the exchange of written notices of acceptance. Secretary Kissinger explained that the Soviet Government had informed the U.S. Government that it could not accept a trading relationship based on legislation recently enacted in the United States. The legislation referred to was the Trade Act of 1974.<sup>3</sup> The Secretary added that the Soviet Union "considers this legislation as contravening both the 1972 Trade Agreement which had called for an unconditional elimination of discriminatory trade restrictions, and the principle of noninterference in domestic affairs." Expressing the Administration's regret at the turn of events, he stated that it continued "to regard an orderly and mutually beneficial trade relationship with the Soviet Union as an important element in the overall improvement of relations."

Article 1 of the 1972 trade agreement called upon each government to accord mutual most-favored-nation treatment for imports of the other country. On the U.S. side this commitment necessitated congressional authorization which was granted in the Trade Act of 1974, but subject to the freedom-of-emigration requirements of the Act, which were in turn subject to waiver under Section 402. The President is permitted to waive the freedom-of-emigration requirements for any country if he reports to Congress that he has determined that such waiver would promote the objectives of freer emigration and that he has received assurances that the emigration practices of the country will lead substantially to free emigration.

At the news conference on January 14, Secretary Kissinger read the following "agreed statement" of which he said the Soviet Government was aware:

Since the President signed the Trade Act on January 3, we have been in touch with the Soviet Government concerning the steps necessary to bring the 1972 U.S.-Soviet Trade Agreement into force.

Article 9 of that Agreement provides for an exchange of written notices of acceptance, following which the agreement, including reciprocal extension of nondiscriminatory tariff treatment (MFN) would enter into force. In accordance with the recently enacted Trade Act, prior to this exchange of written notices, the President would transmit to the Congress a number of documents, including the 1972 agreement,

<sup>3</sup> Dept. of State File No. P75 0033-1121.

<sup>1</sup> 72 DEPT. STATE BULL. 139 (1975).

<sup>2</sup> 11 ILM 1321 (1972).

<sup>3</sup> P.L. 93-618; 88 Stat. 1978; 19 U.S.C. §§1901 *et. seq.*; 14 ILM 181 (1975); approved Jan. 3, 1975.



the proposed written notices, a formal proclamation extending MFN to the U.S.S.R., and a statement of reasons for the 1972 agreement. Either House of Congress would then have had 90 legislative days to veto the agreement.

In addition to these procedures, the President would also take certain steps, pursuant to the Trade Act, to waive the applicability of the Jackson-Vanik amendment. These steps would include a report to the Congress stating that the waiver will substantially promote the objectives of the amendment and that the President has received assurances that the emigration practices of the U.S.S.R. will henceforth lead substantially to the achievement of the objectives of the amendment.

It was our intention to include in the required exchange of written notices with the Soviet Government language, required by the provisions of the Trade Act, that would have made clear that the duration of three years referred to in the 1972 Trade Agreement with the U.S.S.R. was subject to continued legal authority to carry out our obligations. This caveat was necessitated by the fact that the waiver of the Jackson-Vanik amendment would be applicable only for an initial period of 18 months, with provision for renewal thereafter.

The Soviet Government has now informed us that it cannot accept a trading relationship based on the legislation recently enacted in this country. It considers this legislation as contravening both the 1972 Trade Agreement, which had called for an unconditional elimination of discriminatory trade restrictions, and the principle of noninterference in domestic affairs. The Soviet Government states that it does not intend to accept a trade status that is discriminatory and subject to political conditions and, accordingly, that it will not put into force the 1972 Trade Agreement. Finally, the Soviet Government informed us that if statements were made by the United States, in the terms required by the Trade Act, concerning assurances by the Soviet Government regarding matters it considers within its domestic jurisdiction, such statements would be repudiated by the Soviet Government.

In view of these developments, we have concluded that the 1972 Trade Agreement cannot be brought into force at this time and that the President will therefore not take the steps required for this purpose by the Trade Act. The President does not plan at this time to exercise the waiver authority.

The administration regrets this turn of events. It has regarded and continues to regard an orderly and mutually beneficial trade relationship with the Soviet Union as an important element in the overall improvement of relations. It will, of course, continue to pursue all available avenues for such an improvement, including efforts to obtain legislation that will permit normal trading relationships.<sup>4</sup>

Dependent upon the granting of most-favored-nation treatment to the Soviets were (1) the granting of Export-Import Bank credits in accordance with Sections 409 and 613 of the Act, the latter setting a \$300,000,000 limit on such credits to the Soviet Union, and (2) Soviet payments on lend-lease debts under the Agreement between the United States and the

<sup>4</sup> *Supra* note 1.

Soviet Union regarding Settlement of Lend-Lease, Reciprocal Aid and Claims, signed at Washington on October 18, 1972.<sup>5</sup>

At the White House signing ceremony for the Trade Act of 1974 on January 3, 1975, President Gerald R. Ford had noted:

This is an important part of our commercial and overall relations with Communist countries. Many of the Act's provisions in this area are very complex and may well prove difficult to implement. I will, of course, abide by the terms of the Act, but I must express my reservations about the wisdom of legislative language that can only be seen as objectionable and discriminatory by other sovereign nations.<sup>6</sup>

#### FOREIGN INVESTMENT, TAX LAW, AND MULTINATIONAL CORPORATIONS

##### *Transnational Corporations* (US Digest, Ch. 10, §4)

On March 1, 1975, Secretary of State Henry A. Kissinger made an address in Houston, Texas, in which he discussed transnational corporations and investment disputes. The Secretary said in part:

Among the economic issues affecting Western Hemisphere relations none looms larger than the transnational corporation. The transnational corporation has a demonstrated record of achievement as an efficient—and indeed indispensable—source of technology, management skill, and capital for development. At the same time, the transnational character of these corporations raises complex problems of governmental regulation and has aroused concern in Latin America over the relation of their activities to domestic political and economic priorities.

Most Latin American nations take the position that the laws of the host country are conclusive, and that a foreign investor cannot appeal to his own government for protection. The United States, on the other hand, has insisted on espousing the cause of U.S. investors when they are treated in a way which violates international legal standards. And the Congress has reflected this view in such acts as the Hickenlooper and Gonzalez Amendments which cut off aid in the event of nationalization without adequate and timely compensation.

The two legal positions are not easily reconciled. But the United States is prepared to make a serious effort to find a mutually acceptable solution which does not prejudice the principles of either side. A year ago, in Mexico City, at our initiative an inter-American working group was set up to examine the problem.

The United States is prepared in the context of this endeavor:

—To work out a new declaration of principles to govern the treatment of transnational enterprises and for the transfer of technology;

—To develop intergovernmental mechanisms to prevent and resolve investment disputes and the problems between governments that arise from them;

<sup>5</sup> 23 UST 2910; TIAS No. 7478; 11 ILM 1315 (1972); entered into force Oct. 18, 1972.

<sup>6</sup> White House Press Release, Jan. 3, 1975.

—To fashion new modes of cooperation to deal with conflicts of laws and jurisdiction relating to transnational corporations; and

—To encourage private enterprise to make its vital contributions to Latin America in forms congenial to the economic and political needs of the host countries.

We have, in the past, made significant progress in these areas on a pragmatic, case-by-case basis. We should now seek more general agreement as part of the new dialogue. The working group, which was interrupted by the postponement of the Buenos Aires meeting, should resume its important work. A mutually acceptable solution would go a long way toward removing trade and investment conflicts from U.S. decisions respecting aid relationships with the host countries.

This is important because Latin American sensitivity to the exercise of economic leverage has been finely honed by history. Experience has also demonstrated that automatic sanctions—including the 1974 Trade Act's denial of preferences to such OPEC countries as Ecuador and Venezuela, which did not join the oil embargo—are almost always harmful. Automatic sanctions allow no tactical flexibility. They present other governments with a public ultimatum; by seeming to challenge the recipient's sovereignty, they harden positions, encumber diplomacy, and poison the entire relationship.

The Administration supports the purpose of the various bills which have been introduced into the Congress—including one by . . . Senator Bentsen—to modify the provisions of the Trade Act which involve Venezuela and Ecuador. And it is prepared to seek the modification of legislation requiring the automatic cut off of aid. But as a matter of political reality a great deal will depend on our ability to work with the nations of Latin America on new approaches which give practical assurance of fair treatment. They must recognize that congressional sanctions stem from perceived injuries to legitimate interests.

As part of the new dialogue, the Administration is prepared to develop new principles and practices which may commend themselves to Congress as a better remedy than automatic sanctions.<sup>1</sup>

*Foreign Investment in the United States (US Digest, Ch. 10, §4)*

On March 4, 1975, Charles Robinson, Under Secretary of State for Economic Affairs, testified before the Subcommittee on Securities of the Senate Committee on Banking, Housing, and Urban Affairs in opposition to S. 425, 94th Congress, 1st Session. The bill, introduced on January 27, 1975, by Senator Harrison Williams, Jr., was entitled "Foreign Investment Act of 1975." It provided for notification by foreign investors of purchases of equity shares in U.S. firms and gave the President authority to screen and, at his discretion, to block investments which would result in acquisition by a foreigner of beneficial ownership of more than five percent of the equity securities of a U.S. company. He stressed that the traditional policy of the United States has been to minimize the barriers to investment as well as to trade flows and noted that the U.S. commitment to such non-

<sup>1</sup> 72 DEPT. STATE BULL. 364 (1975).

restrictive treatment of foreign investment is embodied in an extensive network of friendship, commerce, and navigation (FCN) treaties. The following are excerpts from his statement:

The Department of State is opposed to S. 425 on the basis that it goes beyond what is necessary to safeguard our national interests from any undesirable foreign investments and might well have the effect of discouraging investments which we would find desirable. . . .

It must be pointed out that the "screening" provisions of this bill—that is, those provisions which permit the President to prohibit the acquisition by foreigners or by U.S. companies controlled by foreigners, of more than 5 percent of most American companies—violate approximately 15 of our treaties of friendship, commerce and navigation.

These FCN treaties are designed to establish an agreed framework within which mutually beneficial economic relations between two countries can take place. The executive branch has long regarded these treaties as an important element in promoting our national interest and building a strong world economy, and the Senate, by ratification of our FCN treaties, has supported this view.

To our benefit, the treaties establish a comprehensive basis for the protection of American commerce and citizens and their business and other interests abroad, including the right to prompt, adequate, and effective compensation in the event of nationalization. However, the FCN treaties are not one-sided. Rights assured to Americans in foreign countries are also assured in equivalent measure to foreigners in this country.

From the viewpoint of foreign economic policy, the incentive for the FCN's was the desire to establish agreed legal conditions favorable to private investment. The heart of "modern" (i.e., post-World War II) FCN treaties—and those with our OECD partners are generally of this type—is the provision relating to the establishment and operation of companies.

This provision may be divided into two parts: (1) the right to establish and acquire majority interests in enterprises in the territory of the other party is governed by the national-treatment standard, (2) the foreign controlled domestic company, once established, is assured national treatment, and discrimination against it in any way by reason of its control by nationals of the foreign cosignatory to the FCN treaty is not permissible. . . . It is these two aspects of many of the treaties which are infringed upon by the bill before us.

It is important to note that the FCN treaties do exempt certain areas from the national-treatment standard in order to conform with laws and policies in existence when the treaties were negotiated and in order not to infringe upon other treaty obligations of the United States or our national security interests. Thus, specific exclusions from national treatment, while varying somewhat from treaty to treaty, include communications, air and water transport, banking, and exploitation of natural resources. Also, the modern FCN provides that its terms do not preclude the application of measures to fissionable materials, regulating the production of or traffic in implements of war or traffic in other materials carried on directly or indirectly for the purpose of supplying a military establishment, or measures necessary to protect

essential security interests. The provisions of S. 425, however, go far beyond the necessary exceptions already permitted to national treatment.<sup>1</sup>

In a Joint Communiqué issued on February 27, 1975, on the first session of the U.S.-Saudi Arabian Joint Commission on Economic Cooperation, the two governments agreed that participation in productive ventures in each other's economies should be mutually beneficial and that such activities would require close consultation. "Consequently, they agreed that each government would consult with the other regarding significant undertakings of this type."<sup>2</sup>

#### FUELS AND ENERGY

##### *International Cooperation (US Digest, Ch. 10, §8)*

On January 16, 1975, at the conclusion of a ministerial meeting of the "Group of Ten," including the Ministers and Central Bank Governors of ten countries participating in the General Arrangement to Borrow, the Group issued a communiqué announcing that it had reached agreement to establish a \$25 billion solidarity fund to meet the economic problems created by the increase in the price of oil. The United States had proposed the establishment of such a fund among the industrial countries at meetings of the Deputies of the "Group of Ten" and the Working Party Three of the Organization for Economic Cooperation and Development (OECD) in Paris in November 1974. A similar proposal was made by the Secretary General of the OECD.

The communiqué reads in part:

... the Ministers and Governors agreed that a solidarity fund, a new financial support arrangement, open to all members of the OECD, should be established at the earliest possible date, to be available for a period of two years. Each participant will have a quota which will serve to determine its obligations and borrowing rights and its relative weight for voting purposes. The distribution of quotas will be based mainly on GNP and foreign trade. The total of all participants' quotas will be approximately \$25 billion.

... The aim of this arrangement is to support the determination of participating countries to pursue appropriate domestic and international economic policies, including cooperative policies to encourage the increased production and conservation of energy. It was agreed that this arrangement will be a safety net, to be used as a last resort. Participants requesting loans under the new arrangement will be required to show that they are encountering serious balance-of-payments difficulties and are making the fullest appropriate use of their own reserves and of resources available to them through other channels. All loans made through this arrangement will be subject to appropriate economic policy conditions. It was also agreed that all participants will jointly share the default risks on loans under the arrangement in proportion to, and up to the limits of, their quotas.

<sup>1</sup> 72 DEPT. STATE BULL. 378 (1975).

<sup>2</sup> *Id.* 370.

... In response to a request by a participant for a loan, the other participants will take a decision, by a two-thirds majority, on the granting of the loan and its terms and conditions, in the case of loans up to the quota, and as to whether, for balance-of-payments reasons, any country should not be required to make a direct contribution in the case of any loan. The granting of a loan in excess of the quota and up to 200 percent of the quota will require a very strong majority and beyond that will require a unanimous decision. If one or more participants are not required to contribute to the financing of a loan, the requirements for approval of the loan must also be met with respect to the contributing participants.

... Further work is needed to determine financing methods. These might include direct contributions and/or joint borrowing in capital markets. Until the full establishment of the new arrangement, there might also be temporary financing through credit arrangements between central banks.

... Ministers and Governors agreed to recommend the immediate establishment of an ad hoc OECD Working Group, with representatives from all interested OECD countries, to prepare a draft agreement in line with the above principles. . . .<sup>1</sup>

Charles A. Cooper, Assistant Secretary of the Treasury for International Affairs testified before the Subcommittee on Multinational Corporations of the Senate Foreign Relations Committee on February 20, 1975, on the financial solidarity fund. He noted that U.S. participation requires the approval of the Congress and that the budget submitted by the President for fiscal year 1976 had recommended up to \$7.0 billion for the facility, and provided for estimated outlays of up to \$1.0 billion that year. He added that the advice received in the course of consultations with the Congress would be a key determinant of the specific legislative proposals eventually put forward.<sup>2</sup>

#### ECONOMIC SANCTIONS

##### *Arab Boycott (US Digest, Ch. 10, §11)*

On February 26, 1975, Senator Frank Church, Chairman of the Senate Foreign Relations Subcommittee on Multinational Corporations, made public a Saudi Arabian edition of an Arab boycott list of more than 1,500 American companies.<sup>1</sup> The list had been furnished by the Department of State, along with the regulations of the boycott office of the Arab League in Damascus, under which Arab countries were not to trade with companies on the boycott list if they had significant investments in Israel, if they helped Israel militarily, if they sold to Israel and not to Arab countries, if they distributed pro-Israeli publications or films, or if they were otherwise deemed to be "Zionist." The regulations provided for exceptions in certain circumstances, for example, where an Arab country finds that an exception would be politically or economically advantageous. Although the

<sup>1</sup> 72 DEPT. STATE BULL. 193 (1975).

<sup>2</sup> For the full text of the statement, see Dept. of the Treasury News, Feb. 20, 1975.

<sup>1</sup> Also in N.Y. Times, Feb. 27, 1975, at 16.

Arab League and its boycott office were nongovernmental, they had received the political support of Arab governments.

President Gerald R. Ford, at a press conference in Hollywood, Florida, the same day issued the following statement:

There have been reports in recent weeks of attempts to discriminate on religious or ethnic grounds against certain institutions or individuals in the international banking community.

I want there to be no doubt about the position of the United States. Such discrimination is totally contrary to the American tradition and repugnant to American principles. It has no place in the free practice of commerce as it has flourished in this country and in the world in the last thirty years.

Foreign businessmen and investors are welcome in the United States when they are willing to conform to the principles of our society. However, any allegations of discrimination will be fully investigated and appropriate action taken under the laws of the United States.<sup>2</sup>

In hearings before the Subcommittee on February 26, 1975, Harold H. Saunders, Deputy Assistant Secretary of State for Near Eastern and South Asian Affairs, testified that the lifting of the boycott was linked to resolution of the Arab-Israeli territorial dispute and expressed the view that the boycott is best dealt with through quiet diplomacy and persuasion, making clear U.S. opposition but without following a policy of confrontation. At the same hearings, representatives of the Army Corps of Engineers testified that the Corps did not take the boycott into consideration in making lists of eligible companies available to Saudi Arabia for construction projects, but indicated that the Saudi policy against admission of Jewish personnel was a factor in assignment of personnel.

On March 13, 1975, representatives from the Department of State and other government agencies testified before the Subcommittee on International Trade and Commerce of the House Foreign Affairs Committee concerning U.S. policy toward the Arab boycott. Sidney Sober, Acting Assistant Secretary of State for Near Eastern and South Asian Affairs, described United States policy toward the boycott as follows:

. . . As stated on numerous occasions our position is clear and it can be summarized as follows: the United States opposes the boycott. We do not support or condone it in any way. The Department has emphasized our opposition to the boycott to the Arab governments on many occasions as it adversely affects United States firms, vessels and individuals. Where the commercial interests of American firms or individuals have been injured or threatened with injury, we have made representations to appropriate Arab officials.

Consistent with our policy of opposition to the boycott, as reflected in the Export Administration Act of 1969, the Department of State has refused hundreds of requests from U.S. companies for authentication of documents relating to the boycott, as being contrary to public policy.

<sup>2</sup> White House Press Release, Feb. 28, 1975.

A number of American firms with boycott problems have consulted with Department officials. These firms have been (A) reminded of their reporting responsibilities under the Export Administration Act and (B) encouraged and requested to refuse to take any action in support of restrictive trade practices or boycotts.

A fundamental factor which has to be faced is that Arab governments regard the boycott as an important element in their position toward Israel, and one of the basic issues of the Arab-Israeli conflict to be dealt with as progress is made toward resolving that conflict. Indeed, this is one of the issues which we have very much in mind as we continue our diplomatic efforts to help the parties achieve a just and lasting peace. The problem has been how to change effectively the underlying conditions which led to imposition of the boycott. We believe we can best serve this objective not through confrontation but by continuing to promote with the parties directly concerned a peaceful settlement of basic Middle East issues. We believe that our present diplomatic approach is the most effective way to proceed.

Gerald L. Parsky, Assistant Secretary of the Treasury, referred to the establishment of closer economic ties with Middle East countries, informally with Kuwait and the United Arab Emirates and through bilateral economic commissions with Egypt, Israel, Iran, and Saudi Arabia, among others. He stated that these efforts worked toward discouraging the boycott by demonstrating the potential contribution of U.S. firms to their economies. He described the policy of the Department of the Treasury as opposing any increased confrontation or alteration in the traditional U.S. policy of a free and open market for trade and investment, "in which capital flows are responsive to market forces unencumbered by governmental influence."

Charles W. Hostler, Deputy Assistant Secretary for International Commerce, expressed the opposition of the Commerce Department to legislative proposals to prohibit U.S. firms from responding to boycott requests. He noted that when the Export Control Act of 1949<sup>3</sup> was extended by Congress on June 30, 1965, it was amended to include a statement that the policy of the United States is "(a) to oppose restrictive trade practices or boycotts fostered or imposed by foreign countries friendly to the United States; and (b) to encourage and request U.S. domestic concerns engaged in export to refuse to take any action or sign any agreement that would further such practices." He stressed that the Congress had used the words "encouraged" and "requested" and had not "prohibited" firms from taking any action or supplying information that might have the effect of furthering boycott practices. The Department of Commerce, he said, supported that policy statement and believed that "American firms should not be restricted in their freedom to make economic decisions based on their own business interests, where no element of ethnic or religious discrimination in violation of U.S. law is involved." He noted that no other country had enacted or intended to enact antiboycott legislation. He

<sup>3</sup> 63 Stat. 7.



urged that there be no change in the "anti-boycott" provisions of the Export Administration Act.<sup>4</sup>

Antonin Scalia, Assistant Attorney General, Department of Justice, discussed legal issues under civil rights and antitrust laws regarding the Arab boycott. He listed the following laws and regulations that might be applicable in dealing with the boycott:

(1) Regarding discrimination in employment: the Constitution itself; Executive Order 11478, prohibiting discrimination in the employment practices of federal agencies; Title VII of the Civil Rights Act of 1964, but noting in particular §703(e) and §717; Executive Order 11246, containing federal restrictions upon discrimination in private employment, the regulations of particular government agencies, for example, the regulations of the Federal Communications Commission, 47 CFR §21.307.

(2) Regarding discrimination in selection of contractors, Title VII of the Civil Rights Act of 1974 and Executive Order 11246.

(3) Regarding discrimination by private firms in the treatment of customers, Title VI of the 1964 Civil Rights Act; Title II of the act, relating to public accommodations; and Title VIII of the 1968 Civil Rights Act, relating to housing.

(4) Regarding the federal antitrust problem, the Sherman Act (15 U.S.C. §§1-7).

Mr. Scalia's statement contained the caveat that no views were being expressed as to whether any reported incident with respect to the Arab boycott constituted a violation of law, but that such incidents were under investigation.

#### ENVIRONMENTAL AFFAIRS

##### *Whaling (US Digest, Ch. 11, §1)*

On January 16, 1975, President Gerald R. Ford informed the Congress that, although he had been informed by the Secretary of Commerce that the Soviet Union and Japan had exceeded the International Whaling Commission quotas for minke whale catches for the 1973-1974 season, he had decided not to impose the trade sanctions authorized under the Pelly Amendment<sup>1</sup> to the Fishermen's Protective Act of 1967. The nonmandatory quotas for whale catches referred to by the President are approved annually by the International Whaling Commission under the authority provided by the International Whaling Convention.<sup>2</sup>

The President's decision not to prohibit the importation of fish products of the offending countries under the authority of the Pelly Amendment was based upon evidence of a conciliatory attitude on the part of the Soviets and the Japanese toward conservation improvements, including their vote for the 1974-1975 season quotas at the International Whaling Commission's

<sup>4</sup> P.L. 91-184; 83 Stat. 841; 50 U.S.C. App. §2402.

<sup>1</sup> P.L. 92-219; 85 Stat. 286; 22 U.S.C. §1978.

<sup>2</sup> 62 Stat. 1716; TIAS No. 1849; 4 BEVANS 248; entered into force for the United States, Nov. 10, 1948.

annual meeting. The President also referred to the serious economic and political impact of trade sanctions and the desirability of seeking reasonable alternatives for achieving conservation objectives.

The President's Message to Congress on the subject reads as follows:

The Pelly Amendment to the Fishermen's Protective Act of 1967, 22 U.S.C. §1978 (1971), states that when the Secretary of Commerce determines that the citizens of a foreign country conduct fishing operations which diminish the effectiveness of a conservation program of an international fishery convention to which the United States is a party, he shall so certify to the President. The President may then direct the Secretary of the Treasury to prohibit the importation of fish products of the offending country. Within sixty days of certification, the President is required to notify the Congress of any action taken by him pursuant to such certification. If the President takes no action, or if he imposes an import prohibition which does not cover all fish products of the offending country, he must inform the Congress of his reasons.

The Secretary of Commerce has certified to me that the minke whale catches of the U.S.S.R. and Japan during the 1973-1974 season exceeded the International Whaling Commission (IWC) quotas for that season. These actions diminished the effectiveness of the conservation program of the Commission.

Quotas on the number of whales to be taken each year are set at the annual meeting of the IWC. These quotas together with certain other limitations constitute an "international fishery conservation program." Objections to adopted quotas are permitted by the terms of the Convention. An objecting country is not legally bound by the quota. Whether or not the objection is legal, however, does not alter the fact that exceeding the quotas will diminish the effectiveness of the program. It constitutes a *prima facie* case for application of the Pelly Amendment.

Last year both Japan and Russia objected to the minke and sperm whale quotas set by the IWC. In the case of the minke whale, a quota of 5,000 whales was set for the Antarctic. This figure was admittedly an informed estimate of the maximum sustainable yield of the stock, since precise figures on existing populations were lacking. Relatively few of these small whales had been previously taken. Nonetheless, the quota represented the best judgment of the scientific advisors and was duly adopted by the member nations. The Soviet Union and Japan voted against this quota. They said the figure should be 8,000, and formally objected to the quota. They then announced that each would take 4,000 minke whales during the 1973-1974 season. In fact, the Soviet Union took 4,000 and Japan took 3,713. This represented an excess of 2,713, or approximately 50 percent over quota.

To date, no prohibition has been imposed under the terms of the Pelly Amendment. I have decided to impose no such prohibition at this time. My decision is based upon the results of this year's meeting of the IWC in London. At this meeting, most of the member nations adopted an Australian amendment to the United States 10-year moratorium resolution. The amended resolution establishes the principle of a selective moratorium applicable to any stocks of whales which fall below their maximum sustainable yield levels or optimum popu-

lation levels as these are determined. In effect, the selective moratorium shall prevent any whale stock from becoming endangered. According to its terms, the resolution shall be implemented in the 1975-1976 whaling conservation measures fixed by the IWC next year.

The June meeting also produced an agreement to strengthen the Secretariat and to convene a working level meeting to consider changes in the International Whaling Convention itself. In addition, the Commission's quotas for the 1974-1975 season incorporated some conservation improvements not included in the quotas for the last season. The Soviets and Japanese voted for the 1974-1975 quotas and, in general, appeared to be more conciliatory than during previous meetings. They, therefore, provided some hope that all member nations would comply with the resolution and with the 1974-1975 quotas.

There is, of course, the serious economic impact of trade sanctions to consider, particularly in the case of Japan, which in 1973 shipped \$235 million in fishery products, 36 percent (in dollar value) of its fishery exports, to the United States. Domestically, withdrawal of Japanese imports, amounting to about 11 percent of our supplies, would result in higher prices for fish products.

Because of the important economic and political ramifications of such sanctions, they should be imposed only after all reasonable alternatives for the achievement of the conservation objective have proven ineffective. With the progress made at this year's IWC meeting, the current situation does not warrant such stringent measures and, therefore, I am taking no action now.

There is, of course, the possibility that subsequent action by Japan or the U.S.S.R. may require a reassessment. In this event I will expect the Secretary of Commerce to submit such reports and recommendations as he finds warranted. The Secretary's present certification, prepared by the National Oceanic and Atmospheric Administration, recommends the course of action I have decided on.<sup>3</sup>

#### RESORT TO WAR AND ARMED FORCE

##### *The Vietnam Peace Agreements (US Digest, Ch. 14, §1)*

The Government of the United States in a note dated January 11, 1975, made public by the Department of State on January 13, 1975, charged the North Vietnamese and the Provisional Revolutionary Government of South Vietnam authorities with "flagrant violation" of the Agreement on Ending the War and Restoring Peace in Vietnam, signed at Paris on January 27, 1973,<sup>1</sup> and the Act of the International Conference on Vietnam, signed at Paris on March 2, 1973.<sup>2</sup> The note,<sup>3</sup> which was addressed by the Department of State to the non-Vietnamese participants in the International Con-

<sup>3</sup> 121 CONG. REC. 165 (1975).

<sup>1</sup> 24 UST 1; TIAS No. 7542; 67 AJIL 389 (1973); 12 ILM 48 (1973); entered into force January 27, 1973.

<sup>2</sup> 24 UST 485; TIAS No. 7568; 67 AJIL 620 (1973); 12 ILM 392 (1973); entered into force March 2, 1973.

<sup>3</sup> The countries addressed in the note are the Soviet Union, People's Republic of China, United Kingdom, France, Hungary, Poland, Indonesia, and Iran. Full text in 72 DEPT. STATE BULL. 144 (1975).

ference on Vietnam, the members of the International Commission of Control and Supervision, and Secretary-General Kurt Waldheim of the United Nations, deplored "the Democratic Republic of Vietnam's turning from the path of negotiation to that of war" and added that the Democratic Republic of Vietnam "must accept the full consequences of its actions." In addition, the note reiterated support for the Republic of Vietnam's call to the Hanoi-Provisional Revolutionary Government side to reopen the talks in Paris and Saigon which are mandated by the Agreement.

The text of the Department's note reads in principal part as follows:

When the Agreement was concluded nearly two years ago, our hope was that it would provide a framework under which the Vietnamese people could make their own political choices and resolve their own problems in an atmosphere of peace. Unfortunately this hope, which was clearly shared by the Republic of Vietnam and the South Vietnamese people, has been frustrated by the persistent refusal of the Democratic Republic of Vietnam to abide by the Agreement's most fundamental provisions. Specifically, in flagrant violation of the Agreement, the North Vietnamese and "Provisional Revolutionary Government" authorities have:

- built up the North Vietnamese main-force army in the South through the illegal infiltration of over 160,000 troops;

- tripled the strength of their armor in the South by sending in over 400 new vehicles, as well as greatly increased their artillery and anti-aircraft weaponry;

- improved their military logistics system running through Laos, Cambodia and the Demilitarized Zone as well as within South Vietnam, and expanded their armament stockpiles;

- refused to deploy the teams which under the Agreement were to oversee the cease-fire;

- refused to pay their prescribed share of the expenses of the International Commission of Control and Supervision;

- failed to honor their commitment to cooperate in resolving the status of American and other personnel missing in action, even breaking off all discussions on this matter by refusing for the past seven months to meet with U.S. and Republic of Vietnam representatives in the Four-Party Joint Military Team;

- broken off all negotiations with the Republic of Vietnam including the political negotiations in Paris and the Two Party Joint Military Commission talks in Saigon, answering the Republic of Vietnam's repeated calls for unconditional resumption of the negotiations with demands for the overthrow of the government as a pre-condition for any renewed talks; and

- gradually increased their military pressure, over-running several areas, including 11 district towns, which were clearly and unequivocally held by the Republic of Vietnam at the time of the cease-fire. Their latest and most serious escalation of the fighting began in early December with offensives in the southern half of South Vietnam which have brought the level of casualties and destruction back up to what it was before the Agreement. These attacks—which included for the first time since the massive North Vietnamese 1972 offensive the over-running of a province capital (Song Be in Phuoc Long Province)—appear to reflect a decision by Hanoi to seek once again to impose a military solution in Vietnam. Coming just before the second anniversary of the Agreement, this dramatically belies Hanoi's claims that it

is the United States and the Republic of Vietnam who are violating the Agreement and standing in the way of peace.

. . . We therefore reiterate our strong support for the Republic of Vietnam's call to the Hanoi—"Provisional Revolutionary Government" side to reopen the talks in Paris and Saigon which are mandated by the Agreement. We also urge that the [addressees] call upon the Democratic Republic of Vietnam to halt its military offensive and join the Republic of Vietnam in re-establishing stability and seeking a political solution.

#### MILITARY SANCTIONS

##### *United States Arms Embargoes (US Digest, Ch. 14, §6)*

On February 24, 1975, the Department of State announced that the United States embargo on the export of military equipment to India and Pakistan had been lifted and that henceforth requests for arms exports for cash to those two countries would be considered on a case-by-case basis. This ended an arms embargo that had been in effect since 1965. Between 1967 and 1971 and from March 14, 1973 until the lifting of the arms embargo in 1975, the United States had followed a policy of selling to India and Pakistan only nonlethal end items and spares and ammunition for previously supplied equipment of U.S. origin.

In making the announcement, Robert Anderson, Special Assistant to the Secretary of State for Press Relations, noted that the lifting of the embargo brought United States policy into line with that followed by other major Western arms suppliers such as the British and French. He added:

. . . this is a cash-only policy; we are not planning to provide any equipment on a grant military assistance basis or on credit. In weighing any individual export requests, we will take into account a number of factors, including the high importance we attach to continued progress toward India-Pakistan normalization, the effect of any particular sale on the outlook for regional peace and stability, the relationship between U.S. sales and those of other external arms suppliers, and of course the relationship of the request to legitimate defense requirements and the level of armaments in the region.<sup>1</sup>

He pointed out further that both the authorizing legislation for military sales and the basic agreements with countries to which the United States supplies arms spell out specific restrictions on their use, such as confining their employment to self-defense and in keeping with the purposes of the United Nations Charter.<sup>2</sup>

<sup>1</sup> 72 DEPT. STATE BULL. 331 (1975).

<sup>2</sup> Sections 3 and 4 of the Foreign Military Sales Act, as amended (P.L. 90-629; 22 U.S.C. §2754, approved Oct. 22, 1968) establish the basis of eligibility and the purposes for which military sales by the United States are authorized. Limitations on the uses which may be made of military equipment furnished by the United States to Pakistan are contained in the agreement relating to transfer of military supplies and equipment to Pakistan, effected by exchange of notes of Nov. 29 and Dec. 15, 1950 (1 UST 884; TIAS No. 2165); a mutual defense agreement, signed May 19, 1950 (5 UST 852; TIAS No. 2976); and a defense support assistance agreement, signed Jan. 11, 1955 (6 UST 501; TIAS No. 3183).

In a press conference on February 25, 1975, Secretary of State Kissinger was questioned about a protest received from India regarding the lifting of the embargo. He replied that "India, because of its size and position, has a special role in South Asia which the United States recognizes" and that "the United States has no interest and will not support or engage in an arms race in South Asia." He added:

We maintain both of these statements. It seemed to us, however, that to maintain an embargo against a friendly country with which we have an allied relationship, while its neighbor was producing and acquiring nearly a billion dollars' worth of arms a year, was morally, politically, and symbolically improper.

. . . the decision to lift the arms embargo does not mean that the United States will engage in a massive supply of arms to Pakistan or that the United States will engage in arms deliveries that can affect the underlying strategic balance. But it seemed to us an anomaly to embargo one country in the area, to be the only country in the world to be embargoing this country, when its neighbor was not exercising a comparable restraint. But, even with this, we will not engage in massive deliveries of arms.

And, secondly, we place great stress on the improving relationship with India. We maintain all the principles that we have asserted with respect to India, and we believe that with wisdom and statesmanship on both sides, the natural friendship between these two great democracies can not only be maintained but be strengthened. . . .<sup>3</sup>

#### ARMS CONTROL AND DISARMAMENT

##### *Seabeds Arms Control (US Digest, Ch. 14, §7)*

On October 25, 1973, the Socialist Federal Republic of Yugoslavia deposited with the Department of State its instrument of ratification of the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil Thereof.<sup>1</sup> Four months later, in a note dated February 25, 1974, the Yugoslav Ambassador at Washington transmitted to the Secretary of State an interpretative statement with respect to Article III, paragraph 1 of the treaty,<sup>2</sup> reading as follows:

In depositing this instrument of ratification, the Government of the Socialist Federal Republic of Yugoslavia wishes to declare the following:

In view of the Government of the Socialist Federal Republic of Yugoslavia, Article 3, Paragraph I, should be interpreted to the effect

<sup>3</sup> 72 DEPT. STATE BULL. 322 (1975).

<sup>1</sup> 23 UST 701; TIAS No. 7337; entered into force for the United States, May 18, 1972.

<sup>2</sup> "In order to promote the objectives of and insure compliance with the provisions of this Treaty, each state party to the Treaty shall have the right to verify through observation the activities of other states parties to the Treaty on the seabed and ocean floor and in the subsoil thereof beyond the [seabed] zone . . . provided that observation does not interfere with such activities."

that a state exercising the right under this article shall be obliged to notify in advance the coastal state, insofar as its observations are to be carried out within the stretch of the sea extending above the continental shelf of the said state.<sup>3</sup>

The Ambassador stated that the above statement had been accepted by the Federal Assembly at the time of the ratification of the treaty, and he requested that, in accordance with the pertinent provisions of the treaty, it be forwarded to the governments of the states signatory and acceding at Washington to the treaty.

In performance of the depositary duties of the Government of the United States under the treaty,<sup>4</sup> the Secretary of State transmitted the Yugoslav statement in a circular note of January 15, 1975, addressed to the Chiefs of Mission of the governments of the states signatory and acceding at Washington to the treaty.<sup>5</sup> In a separate note dated January 16, 1975, addressed to the same states, the Secretary of State presented the views of the United States concerning the Yugoslav note. Those views read in pertinent part as follows:

Insofar as the note is intended to be interpretative of the Treaty, the United States cannot accept it as a valid interpretation. In addition, the United States does not consider that it can have any effect on the existing law of the sea.

Insofar as the note is intended to be a reservation to the Treaty, the United States places on record its formal objection to it on the grounds that it is incompatible with the object and purpose of the Treaty. The United States also draws attention to the fact that the note was submitted too late to be legally effective as a reservation.<sup>6</sup>

<sup>3</sup> Dept. of State File No. P74-0014-0611.

<sup>4</sup> The United States is one of the three depositary governments for the treaty, Article X, para. 5 of which provides that: "The depositary governments shall promptly inform the governments of all signatory and acceding states of the date of each signature, of the date of deposit of each instrument of ratification or of accession, of the date of entry into force of this Treaty, and of the receipt of other notices."

<sup>5</sup> Dept. of State File No. P75 0017-1144.

<sup>6</sup> Dept. of State File No. P75 0017-1209.

## JUDICIAL DECISIONS

ALONA E. EVANS

*Questions of jurisdiction and admissibility—Prior examination required of question of existence of dispute as essentially preliminary matter—Exercise of inherent jurisdiction of the Court.*

*Analysis of claim on the basis of the Application and determination of object of claim—Significance of submissions and of statements of the Applicant for definition of the claim—Power of Court to interpret submissions—Public statements made on behalf of Respondent before and after oral proceedings.*

*Unilateral acts creative of legal obligations—Principle of good faith.*

*Resolution of dispute by unilateral declaration giving rise to legal obligation—Applicant's non-exercise of right of discontinuance of proceedings no bar to independent finding by Court—Disappearance of dispute resulting in claim no longer having any object—Jurisdiction only to be exercised when dispute genuinely exists between the Parties.<sup>1</sup>*

NUCLEAR TESTS CASE (Australia v. France).<sup>2</sup> ICJ Reports, 1974, p. 253. International Court of Justice.<sup>3</sup> Judgment of December 20, 1974.<sup>4</sup>

[May 9, 1973 Australia instituted proceedings against France concerning atmospheric nuclear weapons tests by the French Government in the Pacific. The French Government stated that the Court was not competent in the case, and refused to appoint an Agent or file a reply. Australia chose Sir Garfield Barwick, Chief Justice of Australia, to sit as a judge *ad hoc* in this case. By an Order of June 22, 1973, the Court indicated interim measures of protection.<sup>5</sup> Arguments on the Court's jurisdiction and the admissibility of the Application were made for Australia at public hearings of the Court in July, 1974. The French Government was not represented at those hearings.]

11. In the course of the written proceedings, the following submissions were presented on behalf of the Government of Australia:

in the Application:

*"The Government of Australia asks the Court to adjudge and declare that, for the above-mentioned reasons or any of them or for any other*

<sup>1</sup> Headnote by the Court.

<sup>2</sup> Digested by Wm. W. Bishop, Jr.

<sup>3</sup> Composed for this case of President Lachs, Judges Forster, Gros, Bengzon, Petrán, Onyeama, Dillard, Ignacio-Pinto, de Castro, Morozov, Jiménez de Aréchaga, Waldock, Nagendra Singh, and Ruda, and Judge *ad hoc* Barwick.

<sup>4</sup> Full text of majority opinion, except for preliminary matter. The English text is authoritative.

On the same day the Court gave a similar Judgment, by the same 9 to 4 votes, with a closely similar Opinion, individual Opinions, and Dissenting Opinions, in the *Nuclear Test Case* (New Zealand v. France). [1974] ICJ 457. It also found that the application of Fiji to intervene in these two proceedings "lapses." *Id.* 530 and 535.

<sup>5</sup> [1973] ICJ 99; excerpted in 67 AJIL 778 (1973).



reason that the Court deems to be relevant, the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law.

*And to Order*

that the French Republic shall not carry out any further such tests."

in the Memorial:

"The Government of Australia submits to the Court that it is entitled to a declaration and judgment that:

(a) the Court has jurisdiction to entertain the dispute, the subject of the Application filed by the Government of Australia on 9 May 1973; and

(b) the Application is admissible."

12. During the oral proceedings, the following written submissions were filed in the Registry of the Court on behalf of the Government of Australia:

"The final submissions of the Government of Australia are that:

(a) the Court has jurisdiction to entertain the dispute the subject of the Application filed by the Government of Australia on 9 May 1973; and

(b) the Application is admissible

and that accordingly the Government of Australia is entitled to a declaration and judgment that the Court has full competence to proceed to entertain the Application by Australia on the Merits of the dispute."

13. No pleadings were filed by the French Government, and it was not represented at the oral proceedings; no formal submissions were therefor made by that Government. The attitude of the French Government with regard to the question of the Court's jurisdiction was however defined in the above-mentioned letter of 16 May 1973 from the French Ambassador to the Netherlands, and the document annexed thereto. The said letter stated in particular that:

"... the Government of the [French] Republic, as it has notified the Australian Government, considers that the Court is manifestly not competent in this case and that it cannot accept its jurisdiction."

14. As indicated above (paragraph 4), the letter from the French Ambassador of 16 May 1973 also stated that the French Government "respectfully requests the Court to be so good as to order that the case be removed from the list." At the opening of the public hearing concerning the request for interim measures of protection, held on 21 May 1973, the President announced that "this request . . . has been duly noted, and the Court will deal with it in due course, in application of Article 36, paragraph 6, of the Statute of the Court." In its Order of 22 June 1973, the Court stated that the considerations therein set out did not "permit the Court to accede at the present stage of the proceedings" to that request. Having now had the opportunity of examining the request in the light of the subsequent proceedings, the Court finds that the present case is not one in which the procedure of summary removal from the list would be appropriate.

15. It is to be regretted that the French Government has failed to appear in order to put forward its arguments on the issues arising in the present phase of the proceedings, and the Court has thus not had the assistance it might have derived from such arguments or from any evidence adduced in support of them. The Court nevertheless has to proceed and reach a con-

clusion, and in doing so must have regard not only to the evidence brought before it and the arguments addressed to it by the Applicant, but also to any documentary or other evidence which may be relevant. It must on this basis satisfy itself, first that there exists no bar to the exercise of its judicial function, and secondly, if no such bar exists, that the Application is well founded in fact and in law.

16. The present case relates to a dispute between the Government of Australia and the French Government concerning the holding of atmospheric tests of nuclear weapons by the latter Government in the South Pacific Ocean. Since in the present phase of the proceedings the Court has to deal only with preliminary matters, it is appropriate to recall that its approach to a phase of this kind must be, as it was expressed in the *Fisheries Jurisdiction* cases, as follows:

"The issue being thus limited, the Court will avoid not only all expressions of opinion on matters of substance, but also any pronouncement which might prejudice or appear to prejudice any eventual decision on the merits." (*I.C.J. Reports 1973*, pp. 7 and 54.)

It will however be necessary to give a summary of the principal facts underlying the case.

17. Prior to the filing of the Application instituting proceedings in this case, the French Government had carried out atmospheric tests of nuclear devices at its Centre d'expérimentations du Pacifique, in the territory of French Polynesia, in the years 1966, 1967, 1968, 1970, 1971 and 1972. The main firing site used has been Mururoa atoll some 6,000 kilometres to the east of the Australian mainland. The French Government has created "Prohibited Zones" for aircraft and "Dangerous Zones" for aircraft and shipping, in order to exclude aircraft and shipping from the area of the tests centre; these "zones" have been put into effect during the period of testing in each year in which tests have been carried out.

18. As the United Nations Scientific Committee on the Effects of Atomic Radiation has recorded in its successive reports to the General Assembly, the testing of nuclear devices in the atmosphere has entailed the release into the atmosphere, and the consequent dissipation in varying degrees throughout the world, of measurable quantities of radioactive matter. It is asserted by Australia that the French atmospheric tests have caused some fall-out of this kind to be deposited on Australian territory; France has maintained in particular that the radio-active matter produced by its tests has been so infinitesimal that it may be regarded as negligible, and that such fall-out on Australian territory does not constitute a danger to the health of the Australian population. These disputed points are clearly matters going to the merits of the case, and the Court must therefore refrain, for the reasons given above, from expressing any view on them.

19. By letters of 19 September 1973, 29 August and 11 November 1974, the Government of Australia informed the Court that subsequent to the Court's Order of 22 June 1973 indicating, as interim measures under Article 41 of the Statute (*inter alia*) that the French Government should avoid nuclear tests causing the deposit of radio-active fall-out in Australian territory, two further series of atmospheric tests, in the months of July and August 1973 and June to September 1974, had been carried out at the Centre d'expérimentations du Pacifique. The letters also stated that fall-out had been recorded on Australian territory which, according to the Australian Government, was clearly attributable to these tests, and that "in

the opinion of the Government of Australia the conduct of the French Government constitutes a clear and deliberate breach of the Order of the Court of 22 June 1973."

20. Recently a number of authoritative statements have been made on behalf of the French Government concerning its intentions as to future nuclear testing in the South Pacific Ocean. The significance of these statements, and their effect for the purposes of the present proceedings, will be examined in detail later in the present Judgment.

21. The Application founds the jurisdiction of the Court on the following basis:

"(i) Article 17 of the General Act for the Pacific Settlement of International Disputes, 1928, read together with Articles 36(1) and 37 of the Statute of the Court. Australia and the French Republic both acceded to the General Act on 21 May 1931 . . .

(ii) Alternatively, Article 36(2) of the Statute of the Court. Australia and the French Republic have both made declarations thereunder."

22. The scope of the present phase of the proceedings was defined by the Court's Order of 22 June 1973, by which the Parties were called upon to argue, in the first instance, questions of the jurisdiction of the Court and the admissibility of the Application. For this reason, as already indicated, not only the Parties but also the Court itself must refrain from entering into the merits of the claim. However, while examining these questions of a preliminary character, the Court is entitled, and in some circumstances may be required, to go into other questions which may not be strictly capable of classification as matters of jurisdiction or admissibility but are of such a nature as to require examination in priority to those matters.

23. In this connection, it should be emphasized that the Court possesses an inherent jurisdiction enabling it to take such action as may be required, on the one hand to ensure that the exercise of its jurisdiction over the merits, if and when established, shall not be frustrated, and on the other, to provide for the orderly settlement of all matters in dispute, to ensure the observance of the "inherent limitations on the exercise of the judicial function" of the Court, and to "maintain its judicial character" (*Northern Cameroons, Judgment, I.C.J. Reports 1963, at p. 29*). Such inherent jurisdiction, on the basis of which the Court is fully empowered to make whatever findings may be necessary for the purposes just indicated, derives from the mere existence of the Court as a judicial organ established by the consent of States, and is conferred upon it in order that its basic judicial functions may be safeguarded.

24. With these considerations in mind, the Court has first to examine a question which it finds to be essentially preliminary, namely the existence of a dispute, for, whether or not the Court has jurisdiction in the present case, the resolution of that question could exert a decisive influence on the continuation of the proceedings. It will therefore be necessary to make a detailed analysis of the claim submitted to the Court by the Application of Australia. The present phase of the proceedings having been devoted solely to preliminary questions, the Applicant has not had the opportunity of fully expounding its contentions on the merits. However the Application, which is required by Article 40 of the Statute of the Court to indicate "the subject of the dispute," must be the point of reference for the consideration by the Court of the nature and existence of the dispute brought before it.

25. The Court would recall that the submission made in the Application (paragraph 11 above) is that the Court should adjudge and declare that "the carrying out of further atmospheric nuclear weapon tests in the South Pacific Ocean is not consistent with applicable rules of international law"—the Application having specified in what respect further tests were alleged to be in violation of international law—and should order "that the French Republic shall not carry out any further such tests."

26. The diplomatic correspondence of recent years between Australia and France reveals Australia's preoccupation with French nuclear atmospheric tests in the South Pacific region, and indicates that its objective has been to bring about their termination. Thus in a Note dated 3 January 1973 the Australian Government made it clear that it was inviting the French Government "to refrain from any further atmospheric nuclear tests in the Pacific area and formally to assure the Australian Government that no more such tests will be held in the Pacific area." In the Application, the Government of Australia observed in connection with this Note (and the French reply of 7 February 1973) that:

"It is at these Notes, of 3 January and 7 February 1973, that the Court is respectfully invited to look most closely; for it is in them that the shape and dimensions of the dispute which now so sadly divides the parties appear so clearly. The Government of Australia claimed that the continuance of testing by France is illegal and called for the cessation of tests. The Government of France asserted the legality of its conduct and gave no indication that the tests would stop." (Para. 15 of the Application.)

That this was the object of the claim also clearly emerges from the request for the indication of interim measures of protection, submitted to the Court by the Applicant on 9 May 1973, in which it was observed:

"As is stated in the Application, Australia has sought to obtain from the French Republic a permanent undertaking to refrain from further atmospheric nuclear tests in the Pacific. However, the French Republic has expressly refused to give any such undertaking. It was made clear in a statement in the French Parliament on 2 May 1973 by the French Secretary of State for the Armies that the French Government, regardless of the protests made by Australia and other countries, does not envisage any cancellation or modification of the programme of nuclear testing as originally planned." (Para. 69.)

27. Further light is thrown on the nature of the Australian claim by the reaction of Australia, through its Attorney-General, to statements, referred to in paragraph 20 above, made on behalf of France and relating to nuclear tests in the South Pacific Ocean. In the course of the oral proceedings, the Attorney-General of Australia outlined the history of the dispute subsequent to the Order of 22 June 1973, and included in this review mention of a communiqué issued by the Office of the President of the French Republic on 8 June 1974. The Attorney-General's comments on this document indicated that it merited analysis as possible evidence of a certain development in the controversy between the Parties, though at the same time he made it clear that this development was not, in his Government's view, of such a nature as to resolve the dispute to its satisfaction. More particularly he reminded the Court that "Australia has consistently stated that it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted . . . but no such assurance

was given." The Attorney-General continued, with reference to the communiqué of 8 June:

"The concern of the Australian Government is to exclude completely atmospheric testing. It has repeatedly sought assurances that atmospheric tests will end. It has not received those assurances. The recent French Presidential statement cannot be read as a firm, explicit and binding undertaking to refrain from further atmospheric tests. It follows that the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests." (Hearing of 4 July 1974.)

It is clear from these statements that if the French Government had given what could have been construed by Australia as "a firm, explicit and binding undertaking to refrain from further atmospheric tests," the applicant Government would have regarded its objective as having been achieved.

28. Subsequently, on 26 September 1974, the Attorney-General of Australia, replying to a question put in the Australian Senate with regard to reports that France had announced that it had finished atmospheric nuclear testing, said:

"From the reports I have received it appears that what the French Foreign Minister actually said was 'We have now reached a stage in our nuclear technology that makes it possible for us to continue our program by underground testing, and we have taken steps to do so as early as next year'. . . this statement falls far short of a commitment or undertaking that there will be no more atmospheric tests conducted by the French Government at its Pacific Tests Centre . . . There is a basic distinction between an assertion that steps are being taken to continue the testing program by underground testing as early as next year and an assurance that no further atmospheric tests will take place. It seems that the Government of France, while apparently taking a step in the right direction, is still reserving to itself the right to carry out atmospheric nuclear tests. In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric tests should the French Government subsequently decide to hold them."

Without commenting for the moment on the Attorney-General's interpretation of the French statements brought to his notice, the Court would observe that it is clear that the Australian Government contemplated the possibility of "an assurance that no further atmospheric tests will take place" being sufficient to protect Australia.

29. In the light of these statements, it is essential to consider whether the Government of Australia requests a judgment by the Court which would only state the legal relationship between the Applicant and the Respondent with regard to the matters in issue, or a judgment of a type which in terms requires one or both of the Parties to take, or refrain from taking, some action. Thus it is the Court's duty to isolate the real issue in the case and to identify the object of the claim. It has never been contested that the Court is entitled to interpret the submissions of the parties, and in fact is bound to do so; this is one of the attributes of its judicial functions. It is true that, when the claim is not properly formulated because the submissions of the parties are inadequate, the Court has no power to "substitute itself for them and formulate new submissions simply on the basis of

arguments and facts advanced" (*P.C.I.J., Series A, No. 7*, p. 35), but that is not the case here, nor is it a case of the reformulation of submissions by the Court. The Court has on the other hand repeatedly exercised the power to exclude, when necessary, certain contentions or arguments which were advanced by a party as part of the submissions, but which were regarded by the Court, not as indications of what the party was asking the Court to decide, but as reasons advanced why the Court should decide in the sense contended for by that party. Thus in the *Fisheries* case, the Court said of nine of the thirteen points in the Applicant's submissions: "These are elements which might furnish reasons in support of the Judgment, but cannot constitute the decision" (*I.C.J. Reports 1951*, p. 126). Similarly in the *Minquiers and Ecrehos* case, the Court observed that:

"The Submissions reproduced above and presented by the United Kingdom Government consist of three paragraphs, the last two being reasons underlying the first, which must be regarded as the final Submission of that Government. The Submissions of the French Government consist of ten paragraphs, the first nine being reasons leading up to the last, which must be regarded as the final Submission of that Government." (*I.C.J. Reports 1953*, p. 52; see also *Notiebohm, Second Phase, Judgment, I.C.J. Reports 1955*, p. 16.)

30. In the circumstances of the present case, although the Applicant has in its Application used the traditional formula of asking the Court "to adjudge and declare" (a formula similar to those used in the cases quoted in the previous paragraph), the Court must ascertain the true object and purpose of the claim and in doing so it cannot confine itself to the ordinary meaning of the words used; it must take into account the Application as a whole, the arguments of the Applicant before the Court, the diplomatic exchanges brought to the Court's attention, and public statements made on behalf of the applicant Government. If these clearly circumscribe the object of the claim, the interpretation of the submissions must necessarily be affected. In the present case, it is evident that the *fons et origo* of the case was the atmospheric nuclear tests conducted by France in the South Pacific region, and that the original and ultimate objective of the Applicant was and has remained to obtain a termination of those tests; thus its claim cannot be regarded as being a claim for a declaratory judgment. While the judgment of the Court which Australia seeks to obtain would in its view have been based on a finding by the Court on questions of law, such finding would be only a means to an end, and not an end in itself. The Court is of course aware of the role of declaratory judgments, but the present case is not one in which such a judgment is requested.

31. In view of the object of the Applicant's claim, namely to prevent further tests, the Court has to take account of any developments, since the filing of the Application, bearing upon the conduct of the Respondent. Moreover, as already mentioned, the Applicant itself impliedly recognized the possible relevance of events subsequent to the Application, by drawing the Court's attention to the communiqué of 8 June 1974, and making observations thereon. In these circumstances the Court is bound to take note of further developments, both prior to and subsequent to the close of the oral proceedings. In view of the non-appearance of the Respondent, it is especially incumbent upon the Court to satisfy itself that it is in possession of all the available facts.

32. At the hearing of 4 July 1974, in the course of a review of developments in relation to the proceedings since counsel for Australia had pre-

vously addressed the Court in May 1973, the Attorney-General of Australia made the following statement:

"You will recall that Australia has consistently stated it would welcome a French statement to the effect that no further atmospheric nuclear tests would be conducted. Indeed as the Court will remember such an assurance was sought of the French Government by the Australian Government by note dated 3 January 1973, but no such assurance was given.

I should remind the Court that in paragraph 427 of its Memorial the Australian Government made a statement, then completely accurate, to the effect that the French Government had given no indication of any intention of departing from the programme of testing planned for 1974 and 1975. That statement will need now to be read in light of the matters to which I now turn and which deal with the official communications by the French Government of its present plans."

He devoted considerable attention to a communiqué dated 8 June 1974 from the Office of the President of the French Republic, and submitted to the Court the Australian Government's interpretation of that document. Since that time, certain French authorities have made a number of consistent public statements concerning future tests, which provide material facilitating the Court's task of assessing the Applicant's interpretation of the earlier documents, and which indeed require to be examined in order to discern whether they embody any modification of intention as to France's future conduct. It is true that these statements have not been made before the Court, but they are in the public domain, and are known to the Australian Government, and one of them was commented on by the Attorney-General in the Australian Senate on 26 September 1974. It will clearly be necessary to consider all these statements, both that drawn to the Court's attention in July 1974 and those subsequently made.

33. It would no doubt have been possible for the Court, had it considered that the interests of justice so required, to have afforded the Parties the opportunity, e.g., by reopening the oral proceedings, of addressing to the Court comments on the statements made since the close of those proceedings. Such a course however would have been fully justified only if the matter dealt with in those statements had been completely new, had not been raised during the proceedings, or was unknown to the Parties. This is manifestly not the case. The essential material which the Court must examine was introduced into the proceedings by the Applicant itself, by no means incidentally, during the course of the hearings, when it drew the Court's attention to a statement by the French authorities made prior to that date, submitted the documents containing it and presented an interpretation of its character, touching particularly upon the question whether it contained a firm assurance. Thus both the statement and the Australian interpretation of it are before the Court pursuant to action by the Applicant. Moreover, the Applicant subsequently publicly expressed its comments (see paragraph 28 above) on statements made by the French authorities since the closure of the oral proceedings. The Court is therefore in possession not only of the statements made by French authorities concerning the cessation of atmospheric nuclear testing, but also of the views of the Applicant on them. Although as a judicial body the Court is conscious of the importance of the principle expressed in the maxim *audi alteram partem*, it does not consider that this principle precludes the Court from taking account of statements made subsequently to the oral proceedings, and which merely supplement and reinforce matters already discussed

in the course of the proceedings, statements with which the Applicant must be familiar. Thus the Applicant, having commented on the statements of the French authorities, both that made prior to the oral proceedings and those made subsequently, could reasonably expect that the Court would deal with the matter and come to its own conclusion on the meaning and effect of those statements. The Court, having taken note of the Applicant's comments, and feeling no obligation to consult the Parties on the basis for its decision finds that the reopening of the oral proceedings would serve no useful purpose.

34. It will be convenient to take the statements referred to above in chronological order. The first statement is contained in the communiqué issued by the Office of the President of the French Republic on 8 June 1974, shortly before the commencement of the 1974 series of French nuclear tests:

"The Decree reintroducing the security measures in the South Pacific nuclear test zone has been published in the Official Journal of 8 June 1974.

The Office of the President of the Republic takes this opportunity of stating that in view of the stage reached in carrying out the French nuclear defence programme France will be in a position to pass on to the stage of underground explosions as soon as the series of tests planned for this summer is completed."

A copy of the communiqué was transmitted with a Note dated 11 June 1974 from the French Embassy in Canberra to the Australian Department of Foreign Affairs, and as already mentioned, the text of the communiqué was brought to the attention of the Court in the course of the oral proceedings.

35. In addition to this, the Court cannot fail to take note of a reference to a document made by counsel at a public hearing in the proceedings, parallel to this case, instituted by New Zealand against France on 9 May 1973. At the hearing of 10 July 1974 in that case, the Attorney-General of New Zealand, after referring to the communiqué of 8 June 1974, mentioned above, stated that on 10 June 1974 the French Embassy in Wellington sent a Note to the New Zealand Ministry of Foreign Affairs, containing a passage which the Attorney General read out, and which, in the translation used by New Zealand, runs as follows:

"France, at the point which has been reached in the execution of its programme of defense by nuclear means, will be in a position to move to the stage of underground tests, as soon as the test series planned for this summer is completed.

Thus the atmospheric tests which are soon to be carried out will, in the normal course of events, be the last of this type."

36. The Court will also have to consider the relevant statements made by the French authorities subsequently to the oral proceedings; on 25 July 1974 by the President of the Republic; on 16 August 1974 by the Minister of Defence; on 25 September 1974 by the Minister for Foreign Affairs in the United Nations General Assembly; and on 11 October 1974 by the Minister of Defence.

37. The next statement to be considered, therefore, will be that made on 25 July at a press conference given by the President of the Republic when he said:

"... on this question of nuclear tests, you know that the Prime Minister had publicly expressed himself in the National Assembly in his



speech introducing the Government's programme. He had indicated that French nuclear testing would continue. I had myself made it clear that this round of atmospheric tests would be the last, and so the members of the Government were completely informed of our intentions in this respect . . ."

38. On 16 August 1974, in the course of an interview on French television, the Minister of Defence said that the French Government had done its best to ensure that the 1974 nuclear tests would be the last atmospheric tests.

39. On 25 September 1974, the French Minister for Foreign Affairs, addressing the United Nations General Assembly, said:

"We have now reached a stage in our nuclear technology that makes it possible for us to continue our programme by underground testing, and we have taken steps to do so as early as next year."

40. On 11 October 1974, the Minister of Defence held a press conference during which he stated twice, in almost identical terms, that there would not be any atmospheric tests in 1975 and that France was ready to proceed to underground tests. When the comment was made that he had not added "in the normal course of events," he agreed that he had not. This latter point is relevant in view of the passage from the Note of 10 June 1974 from the French Embassy in Wellington to the Ministry of Foreign Affairs of New Zealand, quoted in paragraph 35 above, to the effect that the atmospheric tests contemplated "will, in the normal course of events, be the last of this type." The Minister also mentioned that, whether or not other governments had been officially advised of the decision, they could become aware of it through the press and by reading the communiqués issued by the Office of the President of the Republic.

41. In view of the foregoing, the Court finds that France made public its intention to cease the conduct of atmospheric nuclear tests following the conclusion of the 1974 series of tests. The Court must in particular take into consideration the President's statement of 25 July 1974 (paragraph 37 above) followed by the Defence Minister's statement on 11 October 1974 (paragraph 40). These reveal that the official statements made on behalf of France concerning future nuclear testing are not subject to whatever proviso, if any, was implied by the expression "in the normal course of events [*normalement*]."

42. Before considering whether the declarations made by the French authorities meet the object of the claim by the Applicant that no further atmospheric nuclear tests should be carried out in the South Pacific, it is first necessary to determine the status and scope on the international plane of these declarations.

43. It is well recognized that declarations made by way of unilateral acts, concerning legal or factual situations, may have the effect of creating legal obligations. Declarations of this kind may be, and often are, very specific. When it is the intention of the State making the declaration that it should become bound according to its terms, that intention confers on the declaration the character of a legal undertaking, the State being thenceforth legally required to follow a course of conduct consistent with the declaration. An undertaking of this kind, if given publicly, and with an intent to be bound, even though not made within the context of international negotiations, is binding. In these circumstances, nothing in the nature of a *quid pro quo* nor any subsequent acceptance of the declaration, nor even any reply or reaction from other States, is required for the dec-

laration to take effect, since such a requirement would be inconsistent with the strictly unilateral nature of the juridical act by which the pronouncement by the State was made.

44. Of course, not all unilateral acts imply obligation; but a State may choose to take up a certain position in relation to a particular matter with the intention of being bound—the intention is to be ascertained by interpretation of the act. When States make statements by which their freedom of action is to be limited, a restrictive interpretation is called for.

45. With regard to the question of form, it should be observed that this is not a domain in which international law imposes any special or strict requirements. Whether a statement is made orally or in writing makes no essential difference, for such statements made in particular circumstances may create commitments in international law, which does not require that they should be couched in written form. Thus the question of form is not decisive. As the Court said in its Judgment on the preliminary objections in the case concerning the *Temple of Preah Vihear*:

“Where . . . as is generally the case in international law, which places the principal emphasis on the intentions of the parties, the law prescribes no particular form, parties are free to choose what form they please provided their intention clearly results from it.” (*I.C.J. Reports 1961*, p. 31.)

The Court further stated in the same case: “. . . the sole relevant question is whether the language employed in any given declaration does reveal a clear intention . . .” (*ibid.*, p. 32).

46. One of the basic principles governing the creation and performance of legal obligations, whatever their source, is the principle of good faith. Trust and confidence are inherent in international co-operation, in particular in an age when this co-operation in many fields is becoming increasingly essential. Just as the very rule of *pacta sunt servanda* in the law of treaties is based on good faith, so also is the binding character of an international obligation assumed by unilateral declaration. Thus interested States may take cognizance of unilateral declarations and place confidence in them, and are entitled to require that the obligation thus created be respected.

47. Having examined the legal principles involved, the Court will now turn to the particular statements made by the French Government. The Government of Australia has made known to the Court at the oral proceedings its own interpretation of the first such statement (paragraph 27 above). As to subsequent statements, reference may be made to what was said in the Australian Senate by the Attorney-General on 26 September 1974 (paragraph 28 above). In reply to a question concerning reports that France had announced that it had finished atmospheric nuclear testing, he said that the statement of the French Foreign Minister on 25 September (paragraph 39 above) “falls far short of an undertaking that there will be no more atmospheric tests conducted by the French Government at its Pacific Tests Centre” and that France was “still reserving to itself the right to carry out atmospheric nuclear tests” so that “In legal terms, Australia has nothing from the French Government which protects it against any further atmospheric tests.”

48. It will be observed that Australia has recognized the possibility of the dispute being resolved by a unilateral declaration, of the kind specified above, on the part of France, and its conclusion that in fact no “commitment” or “firm, explicit and binding undertaking” had been given is based

on the view that the assurance is not absolute in its terms, that there is a "distinction between an assertion that tests will go underground and an assurance that no further atmospheric tests will take place," that "the possibility of further atmospheric testing taking place after the commencement of underground tests cannot be excluded" and that thus "the Government of France is still reserving to itself the right to carry out atmospheric nuclear tests." The Court must however form its own view of the meaning and scope intended by the author of a unilateral declaration which may create a legal obligation, and cannot in this respect be bound by the view expressed by another State which is in no way a party to the text.

49. Of the statements by the French Government now before the Court, the most essential are clearly those made by the President of the Republic. There can be no doubt, in view of his functions, that his public communications or statements, oral or written, as Head of State, are in international relations acts of the French State. His statements, and those of members of the French Government acting under his authority, up to the last statement made by the Minister of Defence (of 11 October 1974), constitute a whole. Thus, in whatever form these statements were expressed, they must be held to constitute an engagement of the State, having regard to their intention and to the circumstances in which they were made.

50. The unilateral statements of the French authorities were made outside the Court, publicly and *erga omnes*, even though the first of them was communicated to the Government of Australia. As was observed above, to have legal effect, there was no need for these statements to be addressed to a particular State, nor was acceptance by any other State required. The general nature and characteristics of these statements are decisive for the evaluation of the legal implications, and it is to the interpretation of the statements that the Court must now proceed. The Court is entitled to presume, at the outset, that these statements were not made *in vacuo*, but in relation to the tests which constitute the very object of the present proceedings, although France has not appeared in the case.

51. In announcing that the 1974 series of atmospheric tests would be the last, the French Government conveyed to the world at large, including the Applicant, its intention effectively to terminate these tests. It was bound to assume that other States might take note of these statements and rely on their being effective. The validity of these statements and their legal consequences must be considered within the general framework of the security of international intercourse, and the confidence and trust which are so essential in the relations among States. It is from the actual substance of these statements, and from the circumstances attending their making, that the legal implications of the unilateral act must be deduced. The objects of these statements are clear and they were addressed to the international community as a whole, and the Court holds that they constitute an undertaking possessing legal effect. The Court considers that the President of the Republic, in deciding upon the effective cessation of atmospheric tests, gave an undertaking to the international community to which his words were addressed. It is true that the French Government has consistently maintained, for example in a Note dated 7 February 1973 from the French Ambassador in Canberra to the Prime Minister and Minister for Foreign Affairs of Australia, that it "has the conviction that its nuclear experiments have not violated any rule of international law," nor did France recognize that it was bound by any rule of international law to terminate its tests, but this does not affect the legal consequences of the statements examined above. The Court finds that the unilateral under-

taking resulting from these statements cannot be interpreted as having been made in implicit reliance on an arbitrary power of reconsideration. The Court finds further that the French Government has undertaken an obligation the precise nature and limits of which must be understood in accordance with the actual terms in which they have been publicly expressed.

52. Thus the Court faces a situation in which the objective of the Applicant has in effect been accomplished, inasmuch as the Court finds that France has undertaken the obligation to hold no further nuclear tests in the atmosphere in the South Pacific.

53. The Court finds that no question of damages arises in the present case, since no such claim has been raised by the Applicant either prior to or during the proceedings, and the original and ultimate objective of Applicant has been to seek protection "against any further atmospheric test" (see paragraph 28 above).

54. It would of course have been open to Australia, if it had considered that the case had in effect been concluded, to discontinue the proceedings in accordance with the Rules of Court. If it has not done so, this does not prevent the Court from making its own independent finding on the subject. It is true that "the Court cannot take into account declarations, admissions or proposals which the Parties may have made during direct negotiations between themselves, when such negotiations have not led to a complete agreement" (*Factory at Chorzów (Merits)*, P.C.I.J., Series A, No. 17, p. 51). However, in the present case, that is not the situation before the Court. The Applicant has clearly indicated what would satisfy its claim, and the Respondent has independently taken action; the question for the Court is thus one of interpretation of the conduct of each of the Parties. The conclusion at which the Court has arrived as a result of such interpretation does not mean that it is itself effecting a compromise of the claim; the Court is merely ascertaining the object of the claim and the effect of the Respondent's action, and this it is obliged to do. Any suggestion that the dispute would not be capable of being terminated by statements made on behalf of France would run counter to the unequivocally expressed views of the Applicant both before the Court and elsewhere.

55. The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since "whether there exists an international dispute is a matter for objective determination" by the Court (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania (First Phase)*, Advisory Opinion, I.C.J. Reports 1950, p. 74). The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared because the object of the claim has been achieved by other means. If the declarations of France concerning the effective cessation of the nuclear tests have the significance described by the Court, that is to say if they have caused the dispute to disappear, all the necessary consequences must be drawn from this finding.

56. It may be argued that although France may have undertaken such an obligation, by a unilateral declaration, not to carry out atmospheric nuclear tests in the South Pacific Ocean, a judgment of the Court on this subject might still be of value because, if the judgment upheld the Applicant's contentions, it would reinforce the position of the Applicant by affirming the obligation of the Respondent. However, the Court having

found that the Respondent has assumed an obligation as to conduct, concerning the effective cessation of nuclear tests, no further judicial action is required. The Applicant has repeatedly sought from the Respondent an assurance that the tests would cease, and the Respondent has, on its own initiative, made a series of statements to the effect that they will cease. Thus the Court concludes that, the dispute having disappeared, the claim advanced by Australia no longer has any object. It follows that any further finding would have no *raison d'être*.

57. This is not to say that the Court may select from the cases submitted to it those it feels suitable for judgment while refusing to give judgment in others. Article 38 of the Court's Statute provides that its function is "to decide in accordance with international law such disputes as are submitted to it"; but not only Article 38 itself but other provisions of the Statute and Rules also make it clear that the Court can exercise its jurisdiction in contentious proceedings only when a dispute genuinely exists between the parties. In refraining from further action in this case the Court is therefore merely acting in accordance with the proper interpretation of its judicial function.

58. The Court has in the past indicated considerations which would lead it to decline to give judgment. The present case is one in which "circumstances that have . . . arisen render any adjudication devoid of purpose" (*Northern Cameroons, Judgment, I.C.J. Reports 1963, p. 38*). The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless. While judicial settlement may provide a path to international harmony in circumstances of conflict, it is none the less true that the needless continuance of litigation is an obstacle to such harmony.

59. Thus the Court finds that no further pronouncement is required in the present case. It does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined. The object of the claim having clearly disappeared, there is nothing on which to give judgment.

60. Once the Court has found that a State has entered into a commitment concerning its future conduct it is not the Court's function to contemplate that it will not comply with it. However, the Court observes that if the basis of this Judgment were to be affected, the Applicant could request an examination of the situation in accordance with the provisions of the Statute; the denunciation by France, by letter dated 2 January 1974, of the General Act for the Pacific Settlement of International Disputes, which is relied on as a basis of jurisdiction in the present case, cannot by itself constitute an obstacle to the presentation of such a request.

61. In its above-mentioned Order of 22 June 1973, the Court stated that the provisional measures therein set out were indicated "pending its final decision in the proceedings instituted on 9 May 1973 by Australia against France." It follows that such Order ceases to be operative upon the delivery of the present Judgment, and that the provisional measures lapse at the same time.

62. For these reasons,  
THE COURT,  
by nine votes to six,

finds that the claim of Australia no longer has any object and that the Court is therefore not called upon to give a decision thereon.

Judges Forster, Gros,<sup>6</sup> Petré,<sup>7</sup> and Ignacio-Pinto concurred but gave Separate Opinions. Judges Onyeama, Dillard, Jiménez de Aréchaga, and Waldock gave a Joint Dissenting Opinion, and Judge de Castro and Judge *ad hoc* Barwick gave Dissenting Opinions. President Lachs made a declaration regarding a statement made and press reports appearing prior to the public reading of the Court's Order of June 22, 1973, while Judges Bengzon, Onyeama, Dillard, Jiménez de Aréchaga, and Waldock made a joint declaration finding unjustified certain criticisms which had been made concerning the Court's handling of this matter.

The Joint Dissenting Opinion thought that the "Judgment fails to take account of the purpose and utility of a request for a declaratory judgment and even more because its basic premise fails to correspond to and even changes the nature and scope of Australia's formal submissions as presented in the Application" (at 312). "The request for a declaration is the essential submission" (at 313). Australia still asks the Court to declare atmospheric nuclear tests inconsistent with international law; France insists that its nuclear tests have not violated international law, and that its cessation of atmospheric tests was not caused by any rule of international law. "Consequently," the opinion states, "the legal dispute between the Parties, far from having disappeared, still persists" (at 320). They also found that the Court had jurisdiction under the General Act of 1928; this was not affected by the later limitations on France's acceptance of the "optional clause" of the Statute of the International Court of Justice:

A reservation relates exclusively to a State's expression of consent to be bound by a particular treaty or instrument and to the obligations assumed by that expression of consent. Consequently, the notion that a reservation attached to one international agreement, by some un-

<sup>6</sup> Referring to earlier approval and participation by Australia in atmospheric nuclear testing by the United Kingdom and the United States, Judge Gros said: "The Applicant has disqualified itself by its conduct and may not submit a claim based on a double standard of conduct and of law. What was good for Australia along with the United Kingdom and the United States cannot be unlawful for other States."

<sup>7</sup> Judge Petré found the admissibility of Australia's Application dependent "on the existence of a rule of customary international law which prohibits States from carrying out atmospheric tests of nuclear weapons giving rise to radio-active fall-out on the territory of other States." He found no such rule. He added:

If a State which does not possess nuclear arms refrains from carrying out the atmospheric tests which would enable it to acquire them and if that abstention is motivated not by political or economic considerations but by a conviction that such tests are prohibited by customary international law, the attitude of that State would constitute an element in the formation of such a custom. But where can one find proof that a sufficient number of States, economically and technically capable of manufacturing nuclear weapons, refrain from carrying out atmospheric nuclear tests because they consider that customary international law forbids them to do so? The example recently given by China when it exploded a very powerful bomb in the atmosphere is sufficient to demolish the contention that there exists at present a rule of customary international law prohibiting atmospheric nuclear tests. . . .

. . . The resolutions passed in the General Assembly of the United Nations cannot be regarded as equivalent to legal protests made by one State to another and concerning concrete instances. They indicate the existence of a strong current of opinion in favour of proscribing atmospheric nuclear tests. That is a political task of the highest urgency, but it is one which remains to be accomplished.

specified process, is to be superimposed upon or transferred to another international instrument is alien to the very concept of a reservation in international law; and also cuts across the rules governing the notification, acceptance and rejection of reservations (at 350).

*Seabed and subsoil—Federal v. State control in U.S.*

UNITED STATES v. MAINE *et al.*<sup>\*</sup>

43 U.S.L.W. 4359 (U.S. Mar. 18, 1975).

The United States brought an action against the thirteen Atlantic coast States for a declaratory decree concerning the Federal Government's exercise of "sovereign rights" over the seabed and subsoil between the three-mile limit of the territorial sea and the outer edge of the continental shelf. The action was prompted by the defendant States' assertions of dominion over that area, including the State of Maine's purported lease of its exclusive rights, for which the United States requested an accounting. The complaint asserted that the Federal Government had held these rights and similar rights to the resources within the territorial sea prior to the Submerged Lands Act of May 22, 1953,<sup>1</sup> which granted the rights within the territorial sea to the defendant States. The claim further stated that the Outer Continental Shelf Lands Act of August 7, 1953<sup>2</sup> gave the Federal Government, acting through the Secretary of the Interior, sole authority to lease the lands in question and that the defendant States were interfering with the exercise of this power. The States answered by way of affirmative defense that they, as successors in title to the Crown of England (and in the case of New York, also the Crown of Holland), were entitled to exercise dominion and control over the areas in question, subject only to the limits of national seaward jurisdiction established by the United States. They further claimed that this exercise was not prohibited by the Constitution of the United States; that these rights had never been delegated to the United States; and that any action by the United States in contravention of these rights violated the Tenth Amendment of the Constitution and was void. The United States moved for summary judgment on the ground that there was no genuine issue as to material fact. Without acting on this motion, the Supreme Court appointed the Honorable Albert B. Maris as special master for the case. He conducted further proceedings and subsequently submitted a report of his findings with the recommendation that a decree be granted in favor of the United States.<sup>3</sup> In a brief opinion, the Supreme Court endorsed the findings of the special master and entered judgment for the United States.

The United States had based its case on the continued vitality of the doctrine enunciated in *United States v. California*<sup>4</sup> and later expanded in

<sup>\*</sup> Prepared by Donald E. Karl, Harvard Law School.

<sup>1</sup> 43 U.S.C. §§1301-15.

<sup>2</sup> 43 U.S.C. §§1331-43.

<sup>3</sup> *United States v. Maine et al.* (In the Supreme Court of the United States, Oct. Term, 1973, No. 35 Original), Report of Albert B. Maris, Special Master, August 27, 1974; 69 AJIL 432 (1975).

<sup>4</sup> 332 U.S. 19 (1947); 42 AJIL 209 (1948).

*United States v. Louisiana*<sup>5</sup> and *United States v. Texas*.<sup>6</sup> In the *California* case, that State had claimed rights to the seabed and subsoil within the three-mile limit on the theory that it had entered the Union on an equal footing with the thirteen original States, which had held such rights prior to their entry into the Union. The Supreme Court, which had rejected this line of reasoning in *California*, found that the principles of decision in that case, which were further refined in the *Texas* and *Louisiana* cases, controlled the present controversy.

[T]hese cases, unless they are to be overruled, completely dispose of the States' claims of ownership here. These decisions considered and expressly rejected the assertion that the original States were entitled to the seabed under the three-mile marginal sea. They also held that under our constitutional arrangement paramount rights to the lands underlying the marginal sea are an incident to national sovereignty and that their control and disposition in the first instance are the business of the Federal Government rather than the States [At 4361].

In response to the defendant States' contention that the evaluation of historical evidence was erroneous, both in the Court's earlier cases and in the master's report, the Court stressed the dual nature of the holding in *California*. The constitutional holding that paramount rights to the seabed inhered in the Federal Government was more important than, and in fact independent of, any historical conclusions as to the possession or maintenance of those rights by a State. To emphasize this point, the Court turned to the *Texas* case, which was distinguishable from *California* because that State had claimed rights to the resources of the seabed on the ground that that State was an independent sovereign with all of the incidents of external sovereignty prior to its entry into the Union. There, the Court had not rejected Texas's claim to prestatehood rights but had held that, notwithstanding the origin of those rights, certain of them had passed to the Federal Government as incidents to its external national sovereignty upon Texas's entry into the Union. Hence, a decision that the original States had such rights prior to their entry into the Union would not affect the outcome of this case.

The defendant States had also contended that the doctrine of the *California* case was repudiated by Congress when it passed the Submerged Lands Act which had granted to the States dominion over the resources of the seabed within the three-mile limit. The Supreme Court, however, found that this transfer was not at odds with the exercise of paramount federal rights nor was the act intended to nullify the *California* doctrine. The Court observed that it had explicitly determined that the *California* case was not impaired by the act in the second *Louisiana* case.<sup>7</sup> Further, language in that act and in the Outer Continental Shelf Lands Act militated against such a conclusion. The Court noted that:

Congress emphatically implemented its view that the United States has paramount rights to the seabed beyond the three-mile limit when

<sup>5</sup> 339 U.S. 699 (1950).

<sup>6</sup> 339 U.S. 707 (1950); 44 AJIL 770 (1950).

<sup>7</sup> *United States v. Louisiana*, 363 U.S. 1 (1960); 54 AJIL 895 (1960).



. . . it enacted the Outer Continental Shelf Lands Act of 1953. . . . Section 3 of the Act "declared [it] to be the policy of the United States that the subsoil and seabed of the Outer Continental Shelf appertain to the United States and are subject to its jurisdiction, control, and power of disposition as provided in this subchapter." [At 4362].

Although the Court was invited to overrule the *California* case, it chose not to do so for several reasons. First, the Court invoked the doctrine of stare decisis and remarked that this was not one of those instances where a reexamination of past constitutional decisions was appropriate. Second, the Court was impressed by the volume and breadth of federal legislation that directly or indirectly concerned the exploitation of offshore resources. Finally, the Court noted that a great number of commercial transactions, which had been conducted with reliance on prior court decisions and federal legislation, would become subject to considerable uncertainty if changes in constitutional interpretation were to occur.

*International trade—Voluntary Restraint Arrangements on Steel Imports—whether violation of Trade Expansion Act*

CONSUMERS UNION OF U.S., INC. v. KISSINGER. 506 F.2d 136.

U.S. Court of Appeals, District of Columbia Circuit, Oct. 11, 1974. Rehearing Denied, Dec. 2, 1974.

Plaintiffs, an organization representing consumer interests brought an action against the Department of State and various U.S., Japanese, British, and West German steel producers, as individual and collective defendants, for infringement upon the constitutional power of Congress under Article I, §8(3) to regulate foreign commerce through the adoption of a program of voluntary restraints upon the import of steel into the United States. It was argued that defendants' agreements violated the Sherman Anti-Trust Act and the Trade Expansion Act of 1962.<sup>1</sup> The complaint relative to the Sherman Act was dismissed with prejudice by stipulation of the parties. With respect to the amended complaint, plaintiffs sought an injunction against the continuation of the voluntary agreements and a judgment declaring that they were ultra vires of the authority of the Department of State. In a memorandum opinion, declaration, and order,<sup>2</sup> the District Court made two declarations:

[T]he Executive has no authority under the Constitution or Acts of Congress to exempt the Voluntary Restraint Arrangements on Steel from the antitrust laws and that such arrangements are not exempt; [and] the Executive is not preempted and may enter into agreements or diplomatic arrangements with private foreign steel concerns so long as these undertakings do not violate legislation regulating foreign commerce, such as the Sherman Act, and that there is no requirement that all such undertakings be first processed under the Trade Expansion Act of 1962.<sup>3</sup>

<sup>1</sup> 15 U.S.C. §1; 19 U.S.C. §§1801-1991 (cited by court). (Footnotes by court omitted.)

<sup>2</sup> *Consumers Union of U.S., Inc. v. Rogers*, 352 F.Supp. 1319 (D.D.C. 1973); 67 AJIL 551 (1973).

<sup>3</sup> 506 F.2d 136, 140 (quoted by court).

The District Court indicated that there was reason to question "the legality of the arrangements under the [Sherman] Act"\* and urged the parties to reconsider their contentions in the light of the memorandum opinion. Injunctive relief was denied. On appeal, the Court of Appeals affirmed the decision below with modifications.

The parties' discussion on appeal of the question whether there had been a violation of the Sherman Act was disregarded by the Court on the ground that this matter, having been dismissed at the outset in the proceedings below, could not be raised again despite the reference to it in the District Court's memorandum opinion. As for the steel import restraints, they did not constitute legally enforceable acts designed to preempt or otherwise infringe upon congressional authority to legislate in regard to foreign commerce. The voluntary restraints were understood by all concerned to be no more than that; they did not violate Article I, §8(3) or the terms of the Trade Expansion Act of 1962.

Senior Circuit Judge Daneher concurred in this opinion. Circuit Judge Leventhal in a lengthy dissenting opinion took the view that the voluntary arrangements constituted bilateral international agreements which had been concluded without that public scrutiny through investigations and hearings which Congress requires for the adoption of changes in foreign trade policy proposed by the Executive Branch.

*Aliens—definition of "entry" into United States—deportation for conviction on charge involving moral turpitude*

LOZANO-GIRON v. IMMIGRATION AND NATURALIZATION SERVICE. 506 F.2d 1073.

U.S. Courts of Appeals, 7th Cir., Dec. 4, 1974.

Petitioner, a Colombian national, was admitted to permanent residence in the United States in 1963. Between 1963 and 1972, he left this country for three trips to Colombia. Petitioner maintained that while in Colombia on the third trip, he exchanged \$2,100 in Colombian currency and certain personal effects with an unknown individual in a dimly lit bar in return for \$2,400 in U.S. currency. He undertook this maneuver because under Colombian exchange controls, as he understood them, he could take only a small amount of Colombian currency out of the country on his return trip to the United States and he could not exchange that currency for U.S. dollars in Colombia. En route to the United States, petitioner allegedly discovered that the \$2,400 in U.S. currency was counterfeit. Upon his arrival in Miami, customs officers found this currency in his possession. Charged under 18 U.S.C. §472, petitioner pleaded guilty and was sentenced to 18 months' imprisonment. Upon completion of his sentence, he was ordered deported to Colombia on the ground that he had been convicted of an offense involving moral turpitude committed within five years of entry and for which he had been sentenced to more than one year in prison. 8 U.S.C. §1251(a)(4). The deportation order was affirmed by the Board of

\* *Ibid.* (quoted by court).

Immigration Appeals. Petitioner's appeal to the Court of Appeals was denied and the deportation order was again affirmed.

Petitioner contended *inter alia* that his return to the United States in 1972 did not constitute an "entry" within the meaning of 8 U.S.C. §1101 (a)(13).<sup>1</sup> Circuit Judge Sprecher observed that the Supreme Court, in *Rosenberg v. Fleuti*, 374 U.S. 449 (1963), had suggested three tests which might be used to determine the meaning of "entry":

- (1) the length of time the alien is absent from the United States;
- (2) the purpose of the visit to the foreign port; and
- (3) "whether the alien has to procure any travel documents in order to make his trip, since the need to obtain such items might well cause the alien to consider more fully the implications involved in his leaving the country."<sup>2</sup>

Other factors which might be weighed into the decision would be the length of residence of the alien in the United States, existence of family or business ties, and his relationship with the state of destination. In *Fleuti* petitioner was absent from the United States for only a few hours. Here, petitioner was absent for 27 days, allegedly for the purpose of getting married, a purpose which was not carried out as the prospective bride apparently declined to marry him. In the opinion of the Court, "... departing to get married . . . [was] meaningfully interruptive of the alien's permanent residence . . . [because] there was a substantial possibility that he would never return."<sup>3</sup>

Another factor militating against petitioner's contention was the amount of Colombian currency which he had in his possession in Colombia, for from this it could be concluded that his original intention had been to remain for some time or indefinitely in Colombia. Following the *Fleuti* tests, Circuit Judge Sprecher also noted that petitioner had no family or business ties in the United States nor did there seem to be any likelihood that deportation to Colombia would endanger his life.

*Aliens—discrimination in employment—whether resident alien may become federal civil service employee*

MOW SUN WONG v. HAMPTON. 500 F.2d 1031.

U.S. Court of Appeals, 9th Circuit, Jan. 25, 1974. Cert. granted June 10, 1974, 94 S.Ct. 3067.

Five resident aliens, Chinese nationals, brought a class action against the U.S. Civil Service Commission (Commission) complaining that they had been discriminated against by reason of their alienage in applying for competitive positions in the federal civil service. They sought an injunction against the enforcement of civil service regulations automatically barring

<sup>1</sup> According to 8 U.S.C. §1101(a)(13), "an alien having a lawful permanent residence in the United States . . . shall not be regarded as making an entry . . . if . . . his departure to a foreign port . . . was not intended or reasonably to be expected by him or his presence in a foreign port . . . was not voluntary." 506 F.2d 1073, 1076 (quoted by court).

<sup>2</sup> Notes 10, 11, 506 F.2d 1073, 1077. (Other footnotes by court omitted).

<sup>3</sup> *Ibid.*, 1079.

aliens from civil service positions and a judgment declaring that such regulations were unconstitutional. The District Court dismissed their action.<sup>1</sup> On appeal, the Court of Appeals reversed the decision of the lower court and remanded the case with instructions to grant injunctive relief to appellants.

Before considering the constitutional issue presented by appellants, Circuit Judge Barnes disposed of several nonconstitutional issues. He agreed with the District Court that the regulations at issue did not constitute acts in excess of authority under the Public Works Appropriation Act, 1970;<sup>2</sup> nor did they contravene the Federal Government's policy of equal opportunity in federal employment,<sup>3</sup> in that the bar to discrimination in regard to national origin which is an integral part of that policy applied only to discrimination against U.S. citizens on that ground.

The constitutional issue here was whether the Commission's exclusion of resident aliens from federal civil service employment violated the due process clause of the Fifth Amendment. In *Sugarman v. Dougall*, 413 U.S. 634 (1973); 68 AJIL 335 (1974), the Supreme Court held that a state statute excluding aliens from employment in the state civil service violated the Equal Protection Clause of the Fourteenth Amendment.<sup>4</sup> However, according to *Bolling v. Sharpe*, the Fifth Amendment does not contain an Equal Protection Clause,<sup>5</sup> but it does embody the principle of fairness, so that a federal statute or the Commission's regulations here could be examined with a view to determining whether they resulted in "such 'unjustifiable discrimination as to be violative of due process.'" <sup>6</sup> In the opinion of the Court,

[A] flat prohibition against aliens obtaining employment in the civil service is such discrimination [as] to be a denial of due process unless the government can show a compelling interest for maintaining its classification.<sup>7</sup>

Among the Commission's arguments in support of the "compelling interest" theory was concern for the economic well-being of citizens and for the security of the country. Circuit Judge Barnes rejected these arguments on the grounds that the resident alien has a stake in both the economy and the security of the country. In the opinion of the Court, other states' practice of requiring citizenship for civil service positions did not reach the constitutional issue posed here. Circuit Judges Barnes concluded:

We hold that the Commission regulations unreasonably discriminate against resident aliens based solely on their status as aliens. We reject the contention of the appellants that the protection provided by the Fifth Amendment is co-extensive with the equal protection clause of the Fourteenth Amendment. However, in the fact situation of this

<sup>1</sup> 333 F.Supp. 527 (N.D. Cal. 1971).

<sup>2</sup> 83 Stat. 323, 336 (1969). (Footnote by court; other footnotes renumbered or omitted.)

<sup>3</sup> Exec. Order No. 11478, 34 Fed. Reg. 12985 (1969) (footnote by court).

<sup>4</sup> See also, *Graham v. Richardson*, 403 U.S. 365 (1971).

<sup>5</sup> 347 U.S. 497, 499 (1954) (cited by court).

<sup>6</sup> 500 F.2d 1031, 1038.

<sup>7</sup> *Ibid.*

case and with the broad sweep of the regulation involved, we hold that it [is] so unjustifiable as to be violative of due process. Here there is no logical or persuasive reason advanced as to why aliens should be excluded from all federal civil service employment; nor is there a refinement of qualifications such as fluency with English, etc., which may or may not prevent employment of an alien. The broad sweep is the vice. It would be saved only by a compelling governmental interest. We have no doubt such a compelling government interest can be shown as to many civil service jobs, but the government has failed to show such a compelling interest for all jobs, and thus, the flat prohibition of the Commission regulations, 5 C.F.R. §338.101, is a denial of due process, and unconstitutional.<sup>8</sup>

*Aliens—discrimination by union in employment of resident alien*

NATIONAL LABOR RELATIONS BOARD v. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, LOCAL NO. 1581, AFL-CIO. 489 F.2d 635.

U.S. Court of Appeals, 5th Circuit, Feb. 19, 1974. Rehearing denied, April 16, 1974.

The National Labor Relations Board (NLRB) petitioned for enforcement of its order to the International Longshoremen's Association, Local No. 5181, AFL-CIO, directing the union to cease its practice of maintaining an employment agreement that provided for a system of preferential job referrals. According to this system, first priority in employment was given to U.S. citizens, second to Mexican nationals whose families resided in the United States, and third to Mexican nationals whose families resided in Mexico.<sup>1</sup> Union membership was available only to U.S. citizens or to declarant aliens. The NLRB contended that this system discriminated against resident aliens and interfered with their free choice of union membership in violation of §§8(a)(3) and 8(b)(2) of the National Labor Relations Act, 29 U.S.C. §§158(a)(3) and 158(b)(2). The union argued that in NLRB practice, unions were allowed to discriminate in employment matters in favor of local residents. The complaint giving rise to the present action was heard by the NLRB's Administrative Law Judge, who recommended dismissal. The NLRB reversed this decision and issued the order now before the Court. The Court of Appeals granted the NLRB's petition.

Circuit Judge Wisdom pointed out that the bar to impermissible discrimination in §8(b)(2) applied not only to a conflict between union and non-union members but also to a situation in which the "union has induced the employer to discriminate on the basis of any invidious or arbitrary classification, such as the classification based upon alienage involved in this case."<sup>2</sup> The Supreme Court had made it clear in a number of decisions that "'classifications based on alienage, . . . are inherently suspect and subject to close judicial scrutiny.'"<sup>3</sup> In the opinion of the Court, the

<sup>8</sup> *Ibid.*, 1040-41.

<sup>1</sup> See, *Guerra v. Manchester Terminal Corp.*, 350 F.Supp. 529 (S.D. Texas 1972); 67 AJIL 553 (1973).

<sup>2</sup> 489 F.2d 635, 637.

<sup>3</sup> *Graham v. Richardson*, 403 U.S. 365, 372 (1971), cited by court. Footnotes by court omitted.

NLRB had correctly found impermissible discrimination in the case which had led to the present proceedings. It was also evident that the union's power to discriminate in job referrals could constitute impermissible pressure upon an employee to join the union. Circuit Judge Wisdom observed that discrimination on the ground that the resident alien's family lived abroad could not be equated with permissible discrimination in favor of local residents.

*Extradition—whether surrender could be enjoined in connection with tax suit*

SHAPIRO V. SECRETARY OF STATE. 499 F.2d 527.

U.S. Court of Appeals, District of Columbia Circuit, May 15, 1974.

Rehearing Denied, July 17, 1974.

Israel sought the extradition of an Israeli national on a charge of securities fraud. The extradition request, which was based upon the 1962 Extradition Treaty with Israel, was granted.<sup>1</sup> This decision was affirmed by the Court of Appeals.<sup>2</sup> Appellant then petitioned the Supreme Court for a writ of certiorari. In a bargain with the Department of State and Israel, he withdrew this petition and agreed to submit voluntarily to extradition in return for Israel's agreement that he was to remain in the United States until the birth of his child and that in Israel he would be free on bond before and during trial and that he would be guaranteed a speedy trial. Following the birth of his child, appellant's extradition was ordered. He transferred certain funds to a New York branch of an Israeli bank for use for his bond. Before he left the country, however, the Internal Revenue Service imposed a jeopardy assessment on him and served "Notices of Levy" on the New York banks in which he maintained accounts or safety deposit boxes. Appellant then brought an action against the Secretary of State and the Commissioner of Internal Revenue seeking preliminary and permanent injunctions against either the extradition order or the tax levies. Defendants moved to dismiss on grounds of failure to state a cause of action and lack of subject matter jurisdiction. Fed.R.Civ.P. 12(b)(6)(1). The District Court issued a temporary restraining order against the extradition order but not against the tax levies. During the course of these proceedings, the Internal Revenue Service reluctantly revealed that its claim rested upon appellant's alleged illegal dealing in narcotics. The District Court dismissed his complaint for want of subject matter jurisdiction. On appeal, the Court of Appeals affirmed this decision as to the extradition order but reversed and remanded on the issue of the District Court's jurisdiction over the injunction against the tax levies.

The Court of Appeals in a per curiam opinion said:

Because the Second Circuit has determined that appellant is extraditable, and because the Secretary of State has signed a valid warrant of

<sup>1</sup> 14 UST 1707, 484 UNTS 283. In re Shapiro, 352 F.Supp. 641 (S.D.N.Y. 1973).

<sup>2</sup> Shapiro v. Ferrandina, 355 F.Supp. 563 (S.D.N.Y. 1973), affd. 478 F.2d 894 (2d Cir. 1973); 68 AJIL 127 (1974).

extradition, the District Court properly concluded that it lacked jurisdiction to enjoin appellant's extradition. Subject to judicial determination of the applicability of the existing treaty obligation of the United States to the facts of a given case, extradition is ordinarily a matter within the exclusive purview of the Executive.<sup>3</sup>

With regard to the tax levies, the Court held that the District Court had limited jurisdiction to hear a request for an injunction against the Internal Revenue Service and that appellant should have been given more opportunity to develop the grounds for his complaint in this matter.

*Refugees—expulsion—1951 Convention Relating to the Status of Refugees—whether aliens unlawfully in country are protected by Article 32*

CHIM MING v. MARKS. 505 F.2d 1170.

U.S. Court of Appeals, 2d Circuit, Nov. 8, 1974.

Plaintiffs, nationals of the People's Republic of China and residents of Hong Kong, entered the United States as nonimmigrant crewmen. They deserted at the end of the 29-day stay authorized under 8 U.S.C. §1282. The question was raised as to whether, as deportable aliens, they could be classified as refugees protected against expulsion by Article 32 of the 1951 Convention Relating to the Status of Refugees.<sup>1</sup> The District Court held that, as plaintiffs were not lawfully within the country, they were not protected by Article 32. The Court of Appeals affirmed this decision.

In a per curiam opinion, the Court of Appeals pointed out that the requirement of lawful presence in the country which appeared in Article 32 must be construed in terms of the provisions regarding unlawful entry which appeared in Article 31, that is, the condition of refugees *qua* deportable alien would be controlled by the territorial state's immigration laws. Appellants were not left without remedies, however, for under Article 31(2), they would be allowed time to select a destination abroad and under Article 33(1) they could not be deported to a country in which they would be subject to persecution "on account of his race, religion, nationality, membership of a particular social group or political opinion."<sup>2</sup> Moreover, §243(h) of the Immigration and Nationality Act of 1952 as amended, 8 U.S.C. §1253(h), authorized the Attorney General in his discretion to withhold deportation of any alien who might be subject to persecution in the state of destination. The Court concluded:

That an alien may be barred from seeking protection under Article 32 by virtue of his being unlawfully in this country does not prevent him from obtaining relief under available provisions of our immigration laws, including not only §243(h), but also §203(a)(7) of the [Immigration and Nationality] Act, 8 U.S.C. §1153(a)(7), referring to conditional entries.<sup>3</sup>

<sup>3</sup> 499 F.2d 527, 530-31.

<sup>1</sup> 189 UNTS 150. The Protocol Relating to Status of Refugees, 1967, binds the United States, 19 UST 6223, TIAS No. 6577.

<sup>2</sup> Footnote by court. (Other footnotes omitted).

<sup>3</sup> 505 F.2d 1170, 1172-73.

## BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS \*

*Law and the Indo-China War.* By John Norton Moore. Princeton, N.J.: Princeton University Press, 1972. Pp. xxxvi, 794. Appendices. Index. \$22.50 cloth; \$9.50 paper.

The thirteen chapters of this important work form a coherent body of thought in spite of the fact that, with the exception of the first chapter, they have been either written or delivered as lectures or testimony on diverse occasions. The book represents most of the published work of John Norton Moore, but the considerable output evidenced is likely to be continued, as evidenced by his thoughtful article on "Law and National Security" in *Foreign Affairs*.<sup>1</sup> The coherence of the material is explicable not only in terms of a general unity of theme but also by the fact that the writing spans a compact period of some five years.

The thought behind the writing is influenced by a strong belief that in the United States since World War II policymaking and government decision have been insufficiently sensitive to legal considerations and, in particular, to considerations of international law. Another general characteristic of the thinking of Professor Moore is a high regard for the principle in Article 2(4) of the United Nations Charter. He dislikes "the arrogance of unilateral power" and states that "unilateral resort to force for the purpose of extending material values . . . is much too destructive and dangerous in the present revolutionary international system." Finally, as he indicates in his second chapter, he has admiration for the policy-oriented jurisprudence of Professors McDougal and Lasswell.

The author's particular concern and overriding theme, expounded in Chapters III to VI, is the relation of intervention in civil strife or internal conflict to the basic principles of the United Nations Charter. The study is to be seen against the background of Professor Moore's views on the role of law in the management of international conflict, set forth in Chapter I. The general approach to the law is conventional and analytical and the category "intervention" is subjected to thorough and fruitful examination. However, unlike most other "Western" writers, the author takes account of the concepts of self-determination and human rights in appraising the question of intervention in civil strife. While the problems are canvassed exhaustively, some of the prescriptions offered are vague and unsatisfactory. Moreover, in several passages the highly questionable assumption is made

\* The Editors wish to thank Professor Alfred P. Rubin, Fletcher School of Law and Diplomacy, for taking over as Book Review Editor from January 1 to June 1, 1975, while Professor Gross was on leave from the Fletcher School.

<sup>1</sup> 51 FOREIGN AFFAIRS 408 (1973).



that rules of customary international law relating to the use of force by states exist alongside the Charter.

The general theme of the earlier chapters is worked out in a special context in Chapters VII to X, which are devoted to the legal aspects of U.S. action in Vietnam and Cambodia. The legal analysis tends to be more rigorous here and Professor Moore is well aware that, as is so often the case, it is the facts which are crucial. Inevitably much attention is devoted to the question of who did what, and in what order, in the years 1954-1961. The facts, as found by the author, tend to be favorable to South Vietnam and the United States (and one should note Professor Moore's "Postscript on 'The Pentagon Papers'"). It is unfortunate that Professor Moore did not deal with the difficult issues concerning the precise nature of the "Geneva Accords," the extent to which Saigon and Washington were bound by them, and the evidence of clandestine operations by the C.I.A. against North Vietnam from 1959 onwards.<sup>2</sup>

The volume is completed by three significant studies of the legal problems raised by the war in Vietnam within the United States political system, a set of documentary appendices, and a selected bibliography. If it were needed, this volume provides confirmation of the considerable contribution of the University of Virginia Law School to public international law.

IAN BROWNLIE

*The Birth of Nations.* By Philip C. Jessup. New York and London: Columbia University Press, 1974. Pp. xv, 361. Index. \$14.95.

Again Philip Jessup has provided the community of international scholars a valuable, innovative description and analysis of important problems in this era of multilateral diplomacy. This book consists primarily of historical accounts of events and negotiations surrounding the creation of new nations out of older states and colonies. In most of the instances, Judge Jessup personally held active responsibility (principally in the late 1940's and 1950's) in some phases of the gestation process.

From the viewpoint of political analysis and diplomatic history, the chapters in this book provide invaluable material. The chapters on Israel, Indonesia, and Korea, for example, illustrate in precise and sometimes fascinating detail the complex political (domestic as well as international) issues influencing the creation of new entities in the family of nations. Sometimes at the United Nations, sometimes in the national capitals of concerned states, sometimes in neutral arenas, and frequently in all such forums at once, the diplomatic moves and power plays show the complexity of achieving international legal change in the modern world. Frequently, such change is violent. But also in some cases, as Judge Jessup's narrative demonstrates, the influences of international law and of international organization procedures have aided in the peaceful solution of otherwise

<sup>2</sup> See Louis Heren, *The Times* (London), April 20, 1968.

explosive situations. In addition to the trenchant and sometimes gripping (to international lawyers, at least) chapters mentioned above, the book discusses: Indochina, Pushtoonistan, Libya, Somalia, Eritrea, and Manchukuo. Of course, these are but a few of the cases in the explosion of new nations in the world's recently arrived postcolonial period. Let us hope that other midwives will provide similar accounts of their own experiences and observations of the nation-forming process. In Judge Jessup's case, his personal recollections were aided by recourse to original files of official communications surrounding the events. These were made available, in accordance with established procedures, by the Department of State and the U.S. Mission to the United Nations.

The resulting narrative provides singularly illuminative insights into the diplomatic history of the nation-birth process. Diplomatist as well as judge and lawyer, Judge Jessup has here provided a blend of the insights coming from a lifetime of multidisciplinary distinction. Much of the description in *The Birth of Nations* recalls to the reader Jessup's scholarship a half century ago in his biography of Elihu Root.

To the international lawyer, some of the most interesting sections of the book are in the comments on international law issues such as recognition, powers of the United Nations, and the relations between law and policy. Only a much longer review could do justice to these as well as the sections of the study on multilateral diplomacy.

Recognizing that the swing of his compass includes only a few of the manifold instances of the birth of nation-states in the post-World War II era, Judge Jessup abstains from forming generalizations in this complex arena. For example, he merely restates the question whether the tragedy of Vietnam might have been avoided or ameliorated had the United Nations been used in procedures for change from the French control. Similarly, he does not in this book offer evaluations of the current problems of the United Nations with its proliferated membership and politically charged deliberations and solutions.

One can only hope that future studies of the same thrust and perception will follow, to join *The Birth of Nations* in the libraries of international scholars (including lawyers!).

HOMER G. ANGELO

*Instytucje Prawa Międzynarodowego [Institutions of International Law].*

By Andrezej Górbiel. Katowice: Wydawnictwo Uniwersytetu Śląskiego, 1972. Pp. 404. Index.

Teaching international law in Eastern Europe, judging from Mr. Górbiel's textbook, follows the pattern established in the war years in Poland. The purpose of the book is to prepare the law student for the foreign service rather than to practice international law in Polish courts. The late Professor Ehrlich of the University of Lwów, later of Kraków experimented, I think successfully, with a modified case method, but in the new political conditions his influence did not survive.

The work under review is hardly a full treatment of the subject. The emphasis is on sources of international law and its history, the state and its organs, international agreements, international organizations (generally those of the socialist and capitalist systems both intergovernmental and non-governmental), ending with a somewhat cursory treatment of the law of armed conflicts.

In spite of its restricted scope and small size (approximately 160,000 words) Mr. Górbieł's book has its strong points. The historical part is full of information not always available in similar works. The book is strong on information and short on argument and propaganda, and in no way resembles the works from the beginnings of the Communist regime in Poland. It is supported by a very extensive though selective bibliography of modern works.

Some areas in which the book demonstrates significant omissions for a book by a Polish scholar suggest the presence of restraints of an ideological nature. The author mentions Poland's partitions at the end of the eighteenth century, but is silent on the German-Soviet transactions which again partitioned Poland in 1939 (p. 49). In the discussion of self-determination, Soviet plebiscites in Polish territories annexed to the Soviet Union on the strength of the Ribbentrop-Molotov Pact are ignored (pp. 103-04). Furthermore, the discussion of the Soviet-Polish frontiers fails to mention the fact that the Potsdam Agreement affirmed the principle of compensation for Polish losses to the Soviet Union at German expense (pp. 104-09). Obviously Soviet Polish relations are not a safe subject for a member of Polish Academia.

One of the unresolved theoretical problems which exercises the ingenuity and imagination of socialist scholars is the class character of the legal rule. *Pro foro interno* the answer is easy—it is proclaimed that socialist law is socialist because it serves a socialist society. Rules of foreign trade present a singular difficulty, as they serve trading partners equally without regard to their class character.

At times the author seems to suggest that certain types of legal rules are primarily characteristic of the international relations of the exploiting societies, such as treaty provisions in antiquity that fugitive slaves shall be returned to their masters and that states shall assist each other in suppression of slave uprisings (p. 15). This interesting characterization finds its equivalents in other epochs. The Holy Alliance (Treaty of Paris of 1815) with the participation of Russia, Prussia, and Austria was quite similar in its purpose. The Warsaw Pact which led to the Soviet intervention in Hungary in 1956 and Czechoslovakia in 1968 can also be put in the same category. In another area of the law, the same idea inspired Article 58 (§§ 1 and 4) of the Soviet Criminal Code of 1926, and Article 10 of the 1958 Law on Anti-State Crimes, which indicate the interest of the socialist system in suppressing political movements, hostile to communism, even outside its area.

KAZIMIERZ GRZYBOWSKI

*International Law in the Western Hemisphere.* Nigel S. Rodley and C. Neale Ronning (eds.). The Hague: Martinus Nijhoff, 1974. Pp. 199. Gld. 38.50. (Prepared under the auspices of New York University Center for International Studies.)

This collection of six essays and five commentaries is the product of the Conference on Problems of International Law in the Western Hemisphere, held in April 1971 under joint sponsorship of the American Society of International Law and the graduate faculty of the New School for Social Research.

Water resources, superpower intervention (military and economic), and human rights comprise the three major parts of the work. In Part I, Robert D. Hayton's survey of nonmaritime international water resources traces the evolution of an awareness of the unity of river systems, to which Latin America made an impressive contribution in the 1933 Montevideo Declaration, reinforced in 1957 by the 10th Conference of the Inter-American Bar Association. There are extensive discussions of the institutional framework of water resources utilization and descriptions of modern water regimes in Latin America (especially in the Plata Basin). Judge José María Ruda presents the Latin American viewpoint against a background of worldwide evolution of the continental shelf concept, and concludes that extending the outer limits of the shelf from the 200-meter to the 2,500-meter isobath would meet the legitimate aspirations of the coastal states. Clearly, the Latin American concept, once held by only a small minority, has come to dominate the current Law of the Sea conference: it is a prime example, stressed by F. V. García-Amador in his commentary, of regional attitudes evolving into a general law. Atwood C. Wolf, in a paper which provides valuable background to the Caracas Conference, examines the UN debates on the area of the ocean beyond national jurisdiction, and here again, Latin American views, supported by most of the developing countries, appear to be headed for general acceptance. In contrast to this emphasis on division and exploitation of the sea and the seabed, Douglas M. Johnston's commentary considers the sea as an entity and as part of the environment which should not be developed piecemeal. His thesis, that arrangements "which cannot be shown by the sciences to be harmful" should be frozen until marine studies have been rationally developed and we know better what we are doing, deserves serious attention.

In Part II, on superpower intervention and the creation of zones of influence, Thomas M. Franck and Edward Weisband propound the idea that intervention in spheres of influence is an imitative response of superpowers to each others' actions and can be reciprocally deescalated. For example, they think that if the United States would abandon or limit intervention in Latin America, the USSR might do likewise in Eastern Europe, although, as Arthur W. Rovine's commentary points out, the values in this instance are not comparable because the USSR regards Eastern Europe as a political and military shield, whereas U.S. interests in Latin America are predominantly economic. Nigel S. Rodley's detailed description of

how Peru nationalized the International Petroleum Company prefaces a discussion of the extent to which a state can protect the economic interests (as distinct from personal and civil rights) of its nationals within a foreign country. Whereas Rodley discusses such protection from the standpoint of the developing countries, Detlev F. Vagts, in the paper following, does so from that of the industrialized world. Seeing in the IPC expropriation a further erosion of investor confidence in the developing countries, he would like to strike a balance between the opposing outlooks and find a workable means of adjudicating investment disputes.

In Part III, Ann van Wynen Thomas and A. J. Thomas give a concise description of the evolution of human rights in Latin America, from ineffective beginnings to the creation of the Inter-American Commission on Human Rights and the American Convention on Human Rights, capping it with a valuable comparison of the Convention's provisions with those of the European Convention for the Protection of Human Rights and Fundamental Freedoms. C. Neale Ronning's commentary underscores what he feels is a positive correlation between the Commission's diligence in pursuing its investigations and two factors—the political “unrespectability” of the regime investigated (citing Cuba as an example), and the small size and relative powerlessness of the states involved (Cuba, Haiti, the Dominican Republic, Guatemala).

The entire work is a fine collection of selective case studies of regional international law in the Americas and deserves a wide circulation.

LUDWIK A. TECLAFF

*Membership and Nonmembership in the International Monetary Fund.*

By Joseph Gold. Washington: International Monetary Fund, 1974. Pp. xiii, 683. Appendix. Index. \$10.00.

With the publication of this book, Joseph Gold, the General Counsel of the International Monetary Fund, adds another volume to his extensive writings on the organization and operation of the IMF. Like his previous studies on the IMF, this book is not intended to provide the reader with an overall view of the workings of the Fund.<sup>1</sup> Rather, it is a specialized account of the legal problems and consequences of membership in the IMF and the impact of the IMF on states which are former members or have not joined the IMF.

The book is well organized and the material is presented clearly and concisely. The three sections to the book are followed by a concluding summary. The first section deals with membership in the IMF, covering such general topics as the establishment of the IMF by the original members, the procedures and criteria for admitting new members, and the

<sup>1</sup> A valuable bibliography can be found at Appendix XI to the book, including, at pages 649–51, a list of Mr. Gold's previous works on the IMF. For the reader interested in a general survey of the IMF, *THE INTERNATIONAL MONETARY FUND, 1945–1965: TWENTY YEARS OF INTERNATIONAL MONETARY COOPERATION*, by J. Keith Horsefield and others (Washington, D.C., 1969) is recommended as well as various pamphlets available at the IMF's offices in Washington, D.C.

effect of changes in the government or political status of existing members. The experience of the IMF in this area is illustrated through several case studies, including the status of the occupied states after World War II, the reluctance of the USSR to join the IMF, the partition of India in 1947, and the formation of the United Arab Republic in 1958. The second section of the book describes the circumstances under which a state can withdraw from the IMF and the legal consequences of withdrawal, both with respect to the IMF and other rights and obligations under domestic and international law. Three states have voluntarily withdrawn from the Fund—Poland, Cuba, and Indonesia (although Indonesia has been readmitted)—and one state, Czechoslovakia, has been compelled to withdraw following IMF proceedings which are meticulously detailed by Mr. Gold. The third section investigates the effects of the IMF on states that are not members. The role of the General Agreement on Tariffs and Trade and the relationship between Switzerland and the IMF are discussed in this part of the book.

Despite the narrow scope of this work, it is extremely useful and worthwhile as a study of the practical application of public international law within the framework of an international organization. For example, the first section of the book contains an interesting account of the IMF's attempt to define a "country" for purposes of admitting new members as well as a discussion of the meaning of a "dependency" in relation to the obligations of a member under the IMF's Articles. Other international legal problems examined in the book include those arising from territorial and constitutional changes in member states and the relationship between rights and obligations of states which are parties to a treaty and those of "third parties." The principal theme which emerges from Mr. Gold's study is that the IMF and other international organizations are contributing to the creation of public international law through the day-to-day operations of these institutions. In this sense, the book has broad appeal and is recommended to those readers interested in the development of an international legal order.

ROBERT S. RENDELL

*The United Nations and Rhodesia. A Study in International Law.* By Ralph Zacklin. New York, Washington, and London: Praeger Publishers, 1974. Pp. xi, 188. Index. \$17.50.

One of the most interesting features of the Rhodesian situation since the unilateral declaration of independence has been the way in which the United Nations has evaded or interpreted the restrictive character of Article 2(7) of the Charter in order to bring events in that territory within its competence. It has been helped by the action of Great Britain as the legal sovereign in invoking the assistance of the institution in view of its own failure to resort to the normal processes for bringing rebels to heel. From the point of view of the United Kingdom it cannot, therefore, be contended that there is any unlawful intervention in domestic jurisdiction,

although the Smith regime adopts a somewhat different point of view. According to Dr. Zacklin, in the Preface to his *United Nations and Rhodesia*, "the unilateral declaration of independence (UDI) by a white racialist minority for the purpose of perpetuating minority rule over a disenfranchised but predominantly African population is not only a clear breach of domestic constitutional law (that is, of the British Crown), but also a violation of and challenge to established principles of international public policy underwritten by international law in general and enacted in the Charter of the United Nations in particular" (pp. vii-viii). Even if this be true, perhaps one may question his blunt assertion that "at the basis of the international community's encroachment upon matters of 'domestic' concern is the realization and the conviction that the denial of fundamental human rights, *wherever it occurs*, is ultimately a threat to international peace and security" (p. vii italics added). After all, it cannot be denied that the United Nations adopts a somewhat eclectic approach to those breaches of fundamental human rights that it is prepared to condemn. In most cases any threat to international peace comes not from the alleged offender, but from some third state which asserts its inability or unwillingness to allow the offender to pursue a particular policy, even if that policy has an analogy in the territory of the objecting state.

This short monograph traces the history of Rhodesia from the days of Rhodes until UDI, although it is perhaps not clear why the author felt it necessary to devote two pages to a short comment on the mandates system and the sacred trust of civilization (pp. 10-12), even if it is to assert that "constitutional and related developments in Rhodesia in the 1920's and 1930's were in sharp contrast to the rhetoric of the Covenant and the principles of the mandate system" (p. 12), for this is true of every colonial territory—and equally irrelevant. The middle portion of the work is concerned with the formulation of the policy of international sanctions and provides one of the briefest and yet most satisfactory accounts of the role of both the General Assembly and Security Council that is to be found, "although, constitutionally, the Council alone disposes of the power to impose mandatory decisions on member states, it is the Assembly that has served as the watchdog of the international community and that has provided the real impetus to the Council's actions" (p. 42). The author points out that the Council may only impose mandatory sanctions in the event of a threat to the peace, breach of the peace, or act of aggression. While it may be realistic to say so, it is perhaps unfortunate to find a lawyer stating without comment that, since the Charter, theoretically at least a legal document, does not define these terms, "the Security Council is free to make its determination on the basis of whatever factual and other considerations it considers appropriate" (p. 38). Taken to its logical conclusion such an argument tends to deny any value to Articles 24 to 26 of the Charter, for it would suffice merely to state that the Council has such powers as its members for the time being say it has.

The longest section of *The United Nations and Rhodesia* consists of a discussion of the theory and reality of international sanctions. Dr. Zacklin

opens this portion of his work by reminding us that while a decision of the Council is legally binding upon members, it is not self-executing but requires implementation by means of an appropriate domestic agency (p. 61); Chapter 10 is concerned with this problem. While he feels that Britain has an impressive record and has been the mainstay of the sanctions operation (p. 80), he nevertheless suggests that there is an ambivalence in British policy which leads to an "impression that it is not pursuing to the maximum the opportunities available to it" (p. 82). The remainder of this chapter is concerned with the United States and nonmembers, but it does not touch upon the conduct of some of the African countries which might have been expected to be the most wholehearted supporters of the sanctions program. Dr. Zacklin, not surprisingly perhaps, is in favor of some international machinery of control to make sanctions effective, and he is aware of the extent to which at the present moment any such effort must depend upon the membership of the Security Council (p. 102). Committed as he is to peaceful action, Dr. Zacklin concludes that "in a Continent facing severe problems of economic development and political stability, a racial conflict in southern Africa would be nothing short of a catastrophe. It is therefore palpably in the interests of the international community to persevere with sanctions until justice in Rhodesia is achieved" (p. 110).

Perhaps as useful as the text are the appendices, covering some 70 pages, in which the most significant resolutions and statements are reproduced. It is a pity that equal care was not taken in compiling the index, which shows some strange inconsistencies in the manner of printing proper names.

L. C. GREEN

*New Directions in the Law of the Sea. Collected Papers, Volume III*, edited by Robin Churchill, K. R. Simmonds, and Jane Welch. *Documents, Volume IV*, compiled and edited by Robin Churchill and Myron Nordquist. London: The British Institute of International and Comparative Law; Dobbs Ferry: Oceana Publications Inc., 1973 and 1975 respectively. Volume III, pp. xxiv, 358. \$17.50; Volume IV, pp. xxviii, 544. \$25.00.

Volume IV completes and brings up to date the first two volumes in this series.<sup>1</sup> It contains a cumulative table of contents of volumes I, II, and IV, and a table of abbreviations in citations. The cumulative table contains references to the sources of the documents that were missing in the first two volumes. The editors included some important documents that appeared after 1972 when the first two volumes were published, and excluded documents submitted to the UN Seabed Committee. Apparently on second thought the editors decided to include in this volume some older material which appeared to them relevant such as the judgments of the ICJ

<sup>1</sup> See 68 AJIL 552 (1974). The editors consider publishing a fifth volume containing documents which may be adopted at the Third UN Conference of the Law of the Sea.



in the *Corfu Channel* and *Fisheries* cases, the 1857 Treaty for the Redemption of the Danish Sound Dues, and the constitution of IMCO. Among more recent materials are several conventions on pollution and the judgment of the ICJ in the *Fisheries Jurisdiction* cases. The Introduction is a useful guide to the documents and their significance. As an example of a bilateral agreement "to deal with disputes arising out of conflicts between fishermen of different States relating to fishing gear or fishing operations," the editors provide the USSR-United States Agreement relating to the Consideration of Claims resulting from Damage to Fishing Vessels or Gear and Measures to Prevent Fishing Conflicts with Annex and Protocol, of February 21, 1973, as being "one of the most recent and detailed of such agreements, as well as being one of the most politically and practically important" (p. xxvii).

Volume III contains a brief survey of the papers prepared for and the discussions at the International Conference on "New Directions in the Law of the Sea," organized by the British Institute of International and Comparative Law and held in London in February 1973. The Conference covered three main topics: fisheries, pollution, and jurisdictional problems. The papers cover a wide spectrum of topics "in keeping with the Institute's intention to adopt throughout a multi-disciplinary approach to the examination of new directions in the law of the sea" (p. xix). The first two chapters contain two "guide-line" addresses, one by Louis Henkin on "Old Politics and New Directions" and another by R. Y. Jennings entitled "The Santiago Conference and the Future." There are predictions of results of the 1974-1975 Law of the Sea Conference scattered throughout the volume and it will be interesting to see who was right or wrong once the results, if any, are in.

The papers cover topics such as living resources (five papers), pollution (three papers), seabed and ocean floor (two papers), navigation (one paper), jurisdictional questions (two papers), national practice (seven papers on Canada, the Federal Republic of Germany, France, Italy, the USSR, the United Kingdom, and "Third World Expectations"). What may appear as uneven coverage in view of the relative significance of the subjects may be due to the fact that not all papers that were commissioned have been delivered. Some matters like scientific research and military activities are not covered at all but there is a paper on "The UN and the Law of the Sea" by Joyce A. C. Guttridge and another on "The EEC and the Law of the Sea" by D. Vignes. The former covers rather well-known ground, whereas the latter will be found very useful particularly by readers in this country.

It would not be profitable to review each of the papers as much of the law of the sea may have to be rewritten when the current lawmaking effort is consummated.

Some of the papers, such as those dealing with pollution (by Michael Hardy, Carl August Fleischer, and S. Houston Lay) and the geophysical characteristics of the seabed and ocean floor by André Guilcher are likely to

be useful no matter what the results of the Conference may be. Others like those on national practice (Canada by J. Y. Morin, Federal Republic of Germany by F. Munch, France by J. P. Quéneudec, Italy by F. Durante, the USSR by W. E. Butler, the United Kingdom by R. R. Churchill) are extremely informative but may require adjustments whether the Conference succeeds or fails. The same may be true of the papers on living resources ("The Freedom of Fishing in Decline: The Case of the North-East Atlantic" by Albert W. Koers; "Fisheries Conservation in the North-East Atlantic and the North Sea: Biological Aspects" by G. Saetersdal; "The Special Interests of Coastal States" by D. H. N. Johnson; "The Economics of Fishing" by J. R. Coull; and "Marine Fish-Farming—Some Legal Problems" by L. K. Newton and I. D. Richardson), although they will remain useful as starting points for further studies. The papers on "Regulation of Navigation" by Colin Warbrick and on jurisdictional questions ("Maritime Zones: A Survey of Claims" by E. D. Brown and "Policing of the High Seas: With Special Reference to the North Sea" by A. De Smet) relate to the core problems of the current Conference and their usefulness will depend on its outcome to some extent, although they are solid studies in their own right. Very useful are the papers on regional approaches ("The Baltic" by Bo Johnsson, "The Baltic-Special Pollution Problems" by G. Reintanz, "The Great Lakes" by Don C. Piper, and "The Persian Gulf" by Richard Young).

Among the studies undertaken with an eye to the Third Law of the Sea Conference, this series is likely to be of substantial and, with some reservations, enduring value.

LEO GROSS

*International Environmental Law.* Teclaff, Ludwik T., and Albert E. Utton (eds.). New York: Praeger Publishers, 1974. Pp. viii, 271. Index. \$13.50.

Messrs. Teclaff and Utton (of the School of Law of Fordham University and of the University of New Mexico, respectively), both experienced researchers and teachers in environmental matters, assembled a distinguished cast of experts to focus on salient aspects of this relatively new field. Dr. Ian Brownlie opens the volume appropriately with an exposition of the modest reach of existing customary rules applicable to environmental protection, followed by Professor Lynton Caldwell's study of the policy concepts involved. The international agreements in the field, both those "in force or in the pipeline," are surveyed briefly by Dr. E. D. Brown of University College, London; the new United Nations Environmental Program (UNEP) is described by Michael Hardy of the UN Office of Legal Affairs. Professor L. F. E. Goldie then essays the value of impact statements on the U.S. model in the conservation of the ocean environment. The well-known developments with respect to the protection of the oceans from pollution are carefully analyzed by Professor Teclaff, and Professor

Utton addresses himself to the right of self-protection asserted by Canada in its Arctic Waters Pollution Prevention Act. The chapter on water quality law, analyzing the international drainage basin notion and other concepts in light of the Helsinki Rules, is also by Professor Utton. The air and outer space aspects of international environmental law are summarized by Professor Howard J. Taubenfeld, while Professor J. W. Samuels of the University of Western Ontario concentrates on the perils and international policy problems connected with weather modification activities. A usually neglected field, national land use decisions as they affect international environmental considerations, is ably handled by Professor A. Dan Tarlock. The final chapter, by Professor Teclaff, is a thoroughgoing evaluation of the impact that this new concern for the environment has had on international law and institutions.

As is to be expected in a collection of this sort, the individual contributions vary in their intensity of analysis, as well as their usefulness to any particular reader. It is not a systematic, exhaustive treatise, assuming that such were achievable at this juncture in such a fast moving area of international law and relations. Every effort was made, obviously, to bring the latest materials and activities into consideration. Additional developments have, of course, occurred since the original symposium was first put to bed as the April 1973 issue of the *Natural Resources Journal*; however, because of the high quality of many of these studies their value to the serious student will not be significantly impaired thereby. Other books and articles have recently appeared that deal with international aspects of pollution and environmental policy, but between two covers this reviewer has yet to find the coverage or the discernment and perspective that are gained from a reading of this volume. Full attention is paid to the central legal questions of state responsibility, jurisdiction, notice, general principles, and domestic law analogies, and also to international supervision and means of implementation generally. This volume, rich in food for thought, is the best text for use in any course on environmental law that takes up the international aspects.

Special mention must be made of the basic concepts and policy propositions so succinctly set down by Professor Caldwell; of Professor Utton's discussion of the Canadian position and his treatment of international, nonmaritime water quality; of Professor Samuel's look into the future of weather modification; of Dan Tarlock's weighing of national prerogatives against international action; and of the exceptionally well-documented critique of "the state of the art" and future prospects by Ludwik Teclaff. The exhaustive examination of the notions surrounding impact statements by Professor Goldie becomes so involved with the American practice that the proposed transplantation to the international level seems neglected, at least by comparison; nonetheless, his "brief," albeit chargeable with common law bias, is a veritable tour de force.

In short, the volume is a notable contribution.

ROBERT D. HAYTON

*World Armaments and Disarmament SIPRI Yearbook 1973.* Stockholm International Peace Research Institute. Stockholm: Almqvist & Wiksell; New York: Humanities Press; London: Paul Elek, 1973. Pp. xxviii, 510. Index. Sw. kr. 75.00. \$15.00.

*The Effects of Developments in the Biological and Chemical Sciences on CW Disarmament Negotiations.* Stockholm International Peace Research Institute. Stockholm: Almqvist & Wiksell, 1974. Pp. 54. Appendix.

The fourth annual *SIPRI Yearbook* is a comprehensive reference work on disarmament matters equally useful to the expert in the field and to the interested general reader. The expert will find in it the texts of recent disarmament agreements, reliable data on the status of bilateral and multilateral disarmament arrangements and negotiations, and statistical information on the arms race and weapons research. These materials and developments are analyzed in instructive studies, providing the general reader with the background needed to understand current disarmament issues and problems.

The *Yearbook* is divided into four parts. The first deals with strategic arms limitation matters. It contains the texts of all SALT I agreements concluded by the United States and the Soviet Union; a useful analysis of these agreements; a penetrating essay by George Rathjens on the major issues confronting future strategic arms negotiations; as well as a study assessing the effectiveness of reconnaissance satellites and current U.S. and USSR satellite reconnaissance capabilities. Since the SALT I agreements are deemed to legitimize the use of reconnaissance satellites to verify arms control agreements, the editors of the *Yearbook* perform a particularly valuable service by examining the technical aspects of this subject.

Three "special topics" are considered in the second part of the *Yearbook*. One study examines disarmament options available in the context of European security negotiations; another reviews recent efforts to outlaw inhumane and indiscriminate weapons, concentrating particularly on napalm and other incendiary weapons. The third essay deals in a most instructive manner with some military and technical problems that were encountered in the deployment of UN peacekeeping forces and discusses the methods which have been proposed to resolve them.

The remaining two parts of the *Yearbook* deal with "The Development and Spread of Arms Races" and "Developments in Arms Control and Disarmament." The five chapters devoted to the arms race offer sound statistical and other information, effectively analyzed and explained, on current military expenditures and armaments research, on trade in major weapons with developing countries, and on arms production in these countries. The section on "Developments in Arms Control and Disarmament" contains, *inter alia*, a most useful survey and statistical information on the status of disarmament agreements; an assessment of the experience that has been gained in the implementation of the disarmament provisions of the 1959 Antarctic Treaty; and a report on multilateral disarmament

negotiations in 1972, which deals in large measure with the problems inherent in obtaining an acceptable agreement outlawing the development, production, and stockpiling of chemical weapons.

The latter subject is considered from a scientific perspective in the instructive monograph on *The Effects of Developments in the Biological and Chemical Sciences on CW Disarmament Negotiations*. It was written by Professor Vitali Zubov of the University of Moscow while he served as a SIPRI research fellow. Professor Zubov concludes that there is an urgent need for a treaty on chemical weapons comparable in its all-encompassing prohibitory scope to the 1972 convention outlawing biological weapons. In his view, potential scientific advances in the field will in the long run nullify the efficacy of a partial solution, favored by some nations, which calls for a step-by-step approach commencing with a treaty outlawing the production and stockpiling of nerve gases—a weapon said to be second only to nuclear weapons in its destructive power. Although the author's conclusion is no doubt valid, he recognizes, correctly I believe, that even a partial chemical disarmament agreement would be a significant step forward.

THOMAS BUERGENTHAL

*Commonwealth International Law Cases*. Collected and edited by Clive Parry and J. A. Hopkins. Dobbs Ferry, New York: Oceana Publications, Inc., 1974. Vols. I and II. Pp. 504, 497. \$40 per volume.

Having completed publication of a compilation of decisions of courts in the British Isles on points of international law,<sup>1</sup> Professor Parry and his associates have begun to compile the reports of equivalent cases decided in British courts outside the home Islands. The first two volumes of a projected ten volume set have been published. The organization follows the pattern of *International Law Reports* and *British International Law Cases* in presenting the cases by subject.

The first two volumes of this new set are devoted to the legal concepts of statehood. The earliest case reported is an 1840 report from the Supreme Court of the Straits Settlements distinguishing between "pirates" and claimants to governmental authority, holding accused Malays to be rebels, and not pirates<sup>2</sup>; the most recent is a 1969 Canadian case refusing to enforce the inheritance taxes of California against the estate of a deceased California resident with real property in Alberta.<sup>3</sup>

It is, of course, possible to cavil. For example, if the *Mahomed Saad* case is included, why not *Ishmahel Laxamana v. East India Company* and *In re Trebeck* (1829)<sup>4</sup> in which a British barrister was stricken from the rolls of the court in Penang for suggesting that a Malay Sultan need not cease to be a Sultan for purposes of British municipal law solely because

<sup>1</sup> BRITISH INTERNATIONAL LAW CASES (9 Volumes), reviewed in 59 AJIL 410 (1965); 60 AJIL 618 (1966); and 63 AJIL 851 (1969).

<sup>2</sup> Regina v. Tunkoo Mahomed Saad and Others, 2 Kyshe (Cr.) 18.

<sup>3</sup> Re Dwelle Estate (1969) 69 W.W.R. 212.

<sup>4</sup> 1 Kyshe (Civil) 4.

the British Government had recognized another government as sovereign over the territory that he continued to regard as his *imperium*. But perhaps the report of those cases will appear in later volumes of the collection.

Where *British International Law Cases* may be redundant in many libraries that already contain basic British materials, comprehensive collections of Commonwealth and colonial reports are harder to find. Thus, the utility of this new series will be greater. Even when cases were ultimately decided in the Privy Council, the decisions of the Commonwealth or colonial court from which the appeal was taken can add much to the student's perception of the issues. The editor promises this sort of background in connection with forthcoming volumes, which will contain lower court decisions preceding the leading Privy Council judgments in *Walker v. Baird* and *Chung Chi Cheung v. The King*, among others. And there are important unappealed cases in the colonial and Dominion courts, as any user of the *International Law Reports* series knows already.

The reproduction of the cases is by a photographic process that assures the authenticity of the text even if it leaves some reports less easy to read than others. None is difficult to read. The reproduction process has also led the editors to be reluctant to edit the actual texts of cases reported. Thus, while the value of the set for scholars and libraries is enhanced, 56 pages is a lot for the reasoning in the *Mahomed Saad* case, and 93 for the two *Hunt* cases concerning the status of Samoa in 1880, despite the fascination of all the cases. In view of the cost of each volume, however, it must be concluded that the editors made a wise choice in preferring to produce their compilation in the way most appropriate for libraries rather than individual scholars.

ALFRED P. RUBIN

*Community Law in the French Courts: The Law of Treaties in Modern Attire.* By Eric E. Bergsten. The Hague: Martinus Nijhoff, 1973. Pp. 141. Gld. 27.50.

Much of the literature has long criticized the reluctance of French courts to comply with the policy of Article 177 of the Rome Treaty for the referral of "Community law questions" to the Communities' Court of Justice in Luxembourg. Two decisions of the Conseil d'Etat, in particular (in *Shell-Berre* and in *Semoules*), gave rise to fears that the application (and supremacy) of Community law is not assured in France. *Semoules*, in fact, drew bitter criticism from former Advocate-General Lagrange of the Court of Justice, who had rejoined the Conseil d'Etat, and resulted in calls within the Community for legal action against France for violation of the Rome Treaty.

The criticism overlooks the fact that, up to 1972, some sixteen cases had been referred to the Court of Justice from France, albeit not by the Conseil d'Etat but by the Cour de Cassation and by lower French courts. The number is admittedly small, especially when compared with the flood of references from Germany. The explanation for the difference, also usually overlooked, lies in the fact that French and German judicial traditions

and practices differ fundamentally. German law, for instance, provides a procedure for review of domestic law for its constitutionality (lacking in France) and for a domestic referral procedure similar to that of Article 177. Combined with constitutional provisions which provide (despite difficulties of interpretation which have emerged in recent case law) for transfer of power to international institutions, these German domestic law provisions made adjustment to the Treaty's framework relatively easy. None of this applied to France, where strict notions of separation of powers did not lead to judicial supervision of legislative or executive action but rather to noninterference by the judiciary and deference to the "acts of government." Article 55 of the 1958 Constitution, giving constitutional rank to treaties, thus had a different impact, in the light of French legal tradition, than observers with different legal traditions of their own expected. Article 55, to the French, was rather a statement of state policy, even governmental obligation, but, just as its 1946 predecessor, not designed to change the role of the judiciary vis-à-vis the executive part of the government. In fact, the establishment of a Constitutional Council for limited *preenactment* review of legislation for constitutionality rather underscores that post enactment review by the courts was not intended, Article 55 notwithstanding.

Professor Bergsten's monograph traces the treatment of treaties in the French courts, with particular attention to the development of the functions of the Conseil d'Etat as a judicial branch distinct from the "regular" courts. His careful and fully well-documented analysis amply shows that failure or reluctance to refer under Article 177 of the Rome Treaty was and is not grounded on hostility to the Community legal system but is part of the judicial tradition described. It is, on the contrary, remarkable that referrals were made and are growing more frequent. The will and readiness to cooperate and to accommodate are there, both on the formal level (proposals to amend the constitution) and in the practice of all courts other than the Conseil d'Etat which labors under restraints peculiar to its history and position. Professor Bergsten's review and analysis are a welcome objective (and sympathetic) view of French practice with respect to Article 177.

PETER HAY

*Rückerstattung nach den Gesetzen der Alliierten Mächte.* By Walter Schwarz. (Vol. I of *Die Wiedergutmachung nationalsozialistischen Unrechts durch die Bundesrepublik Deutschland*). Munich: Verlag C. H. Beck, 1974. Pp. xxv, 394. DM 68.

The wrongs of Hitler's Third Reich were of such magnitude that any recital of the efforts made to redress the injuries must recall the shameful evils perpetrated. Almost 30 years after the war there has now appeared the first of a series of volumes planned to describe the measures taken in Western Germany for the "*Wiedergutmachung*" of National Socialist injustices. The generic German caption is misleading, for most of the injuries could never be "made good again," but there was a comprehensive

legislative program to afford restitution for tangible property and to provide a measure of compensation for personal injuries and economic losses. We are indebted to Dr. Schwarz, as the initiator and the author of the first volume, and to the Federal Republic of Germany as the financial sponsor, for the courage to open this delicate subject to public scrutiny.

With defeated Germany in ruins, the four Occupying Powers soon faced problems of restoring to the rightful owners the properties which had been unlawfully taken from them. Cold war rivalries and differing perspectives forced the abandonment of attempts to obtain uniform and quadripartite legislation. It was the U.S. Military Government law which set the pattern for the most comprehensive action. The United Kingdom followed with similar legislation for its zone, the French with a substantially different law, and finally there was an amalgam for the Western Sectors of Berlin. In the Soviet area practically nothing was done as state ownership displaced private property rights.

Dr. Schwarz traces the origins of the Allied laws, including the drafts submitted by the German Laender or states created in the U.S. zone. He describes the procedures for placing property under military control, for submitting claims for settlement by German agencies, the adjudication of contentious defenses and counterclaims by chambers of the German judicial system, and the final decisions rendered by Courts of Restitution Appeals staffed initially by Allied judges and later expanded to include German nationals. The author, an Israeli subject now resident in Switzerland, and an expert on restitution law, has dissected some 4500 decisions to reach his own conclusions regarding the effectiveness of the justice that emerged.

Despite his criticism of many Allied decisions and the sympathy expressed for the German judges upon whom was thrust the burden of applying concepts foreign to traditional German jurisprudence, Dr. Schwarz recognizes that the Allied laws were not punitive and that the amicable settlement of about 95 percent of the claims in five years' time was a substantial achievement. Although no mention of it is made by the author, anyone familiar with the events will recall that whatever success may be attributed to the restitution program was due in large measure to the determination of General Lucius D. Clay, while he was Military Governor, and to John J. McCloy, while he was U.S. High Commissioner.

Later volumes and other authors will deal with the problems of heirless property and the vast and very laudable program of indemnification whereby the Federal Republic of Germany—in sharp contrast to its Eastern counterpart, The German Democratic Republic—provided compensation to large numbers of surviving victims of persecution for the false imprisonment in concentration camps, damage to their health, and other personal injuries. Reparations to Israel and other states will also be dealt with in this series, which probes problems having profound legal, economic, social, and moral significance. In unfolding this first phase, Dr. Schwarz has set a standard of scholarship and erudition which will be difficult to match.

BENJAMIN B. FERENCZ



*Foreign Relations of the United States, 1949, Volume III, Council of Ministers, Germany and Austria.* (Dept. of State Pub. No. 8752). Washington: U.S. Govt. Printing Office, 1974. Pp. xxv, 1324. Index. \$14.55.

This massive volume consisting largely of previously unpublished classified documents gives the official Department of State record for a crucial year in the development of post-World War II Germany and Austria. The underlying theme is the effort of the United States, Great Britain, and France to check further extension of Soviet power and to withdraw from the responsibilities of occupation status, leaving free governments able to maintain democratic institutions.

It was no mean achievement to bring the United States, Great Britain, and France into agreement with respect to the government of West Germany and the lifting of economic restrictions. All three were apprehensive of the extension of Soviet power but France, understandably, and Great Britain, to a less extent, were also apprehensive of the revival of a powerful Germany. Yet the three governments did work out a common policy and within the framework of the Allied agreement it was possible during the year for the West Germans to draft a constitution and proceed to the establishment of the Federal Republic of Germany.

The year marked a shift in Soviet tactics if not in long-range objectives. The ground blockade had failed to shake the Allied position in Berlin in view of the success of the airlift, and the Allied countering economic restrictions apparently were hurting.

The basis for ending the Berlin blockade and the calling of a four-power Foreign Ministers Council to consider German problems was laid in conversations in New York, March 15–May 4, between the Soviet Ambassador to UN, Yakov A. Malik, and Philip C. Jessup, U.S. Deputy Representative to UN. Agreement was reached on May 4 that all restrictions imposed since March 1, 1948 on trade with Berlin and between the Eastern and Western Zones of Germany would be lifted on May 12 and that a meeting of the Council of Foreign Ministers would convene in Paris on May 23.

Trade with West Berlin was not without continued harassments and the Council of Foreign Ministers failed to reach any substantial agreements regarding Germany, but at least a crisis had been passed. Soviet efforts to block the establishment of the West German Government and to restore a united four-power control of Berlin failed. The best the Soviets could do to counter the organization of a democratic government in West Germany was to set up its "German Democratic Republic" in East Germany.

When the Council of Foreign Ministers could reach no agreements on West Germany and Berlin, an effort was made to negotiate a treaty on Austria. The Foreign Ministers' Deputies for the Austrian Treaty had held 53 meetings between February 9 and May 10 with little progress. In the Council of Foreign Ministers progress was made with substantial Soviet concessions. A general agreement was reached on broad lines, and then the matter was referred back to the Deputies to work out the details and to draft the treaty.

Details, however, proved not so easy to work out in spite of the fact

that America, Britain, and France were anxious to obtain a treaty. The Soviets had withdrawn their backing for reparations and territorial concessions to Yugoslavia and had agreed to a lump sum payment in lieu of Soviet claims to German property in Austria, but Soviet claims to oil rights in Austria and shipping facilities on the Danube were not readily settled. An American concern was the establishment by Austria of armed forces to maintain stability when a treaty was signed and Allied and Soviet troops were withdrawn. The year ended with no final treaty agreement, the Deputies adjourning to meet again in 1950.

In compiling this volume the editors have done well in selecting the documents needed for a comprehensive understanding of the issues involved. For those wishing to pursue a more intensive study, there are frequent citations to further documentation in the Department of State Archives.

E. R. PERKINS

*Foreign Relations of the United States, 1948, Volume VI, The Far East and Australasia.* (Dept. of State Pub. No. 8681.) Washington: U.S. Govt. Printing Office, 1974. Pp. x, 1379. Index. \$14.40.

Volume VI, *The Far East and Australasia* includes U.S. relations with the countries of that area with the exception of China. Volumes VII and VIII, *The Far East: China* were published in 1973.<sup>1</sup>

While the U.S. Government was in 1948 not yet deeply involved in the problems of French Indochina, it had a concerned interest and brought its views to the attention of the French Government. It was felt that a parade of puppets such as the French had produced in the past two years would strengthen Ho Chi Minh and insure the emergence of a Communist-dominated state. Ambassador Caffery in Paris was instructed to apply "persuasion and/or pressure" on the French Government to approve "unequivocally and promptly" the principle of Viet independence within the French union.

The situation in Vietnam was complicated by the concealed control of the Nationalist movement by the Communists. George M. Abbott, U.S. Consul General at Saigon, reported: "A small group of Moscow and Chinese trained Communists has firm control of the strong and deep seated native Nationalism. . . . At the same time Communist control has been concealed and identified with Nationalism so successfully as to confuse and delude public opinion in France and the United States and thus gain support of large Socialist and liberal groups in those countries" (p. 54).

The most extensively documented subject treated in this volume concerns the interest of the United States and of the United Nations in the conflict between the Netherlands Government and Nationalist forces opposing the restoration of Dutch rule in the Netherlands East Indies (Indonesia). The United States played a prominent part in efforts for a negotiated settlement through representation on the UN Good Offices Committee and also through direct diplomatic representations.

<sup>1</sup> Reviewed in 68 AJIL 567 (1974).

The year opened auspiciously when a truce agreement was signed on the U.S.S. *Renville* between the Netherlands and the Republic of Indonesia. The agreement envisaged negotiations for an independent Indonesian Government in union with the Netherlands, but efforts to bring about effective negotiations implementing the agreement failed and the Netherlands on December 18 terminated the truce and seized the capital of the Republic of Indonesia. Efforts during 1948 for a settlement are reviewed in an instruction sent December 31 to all U.S. diplomatic and consular posts. In this instruction the Department of State definitely placed upon the Netherlands Government responsibility for the breakdown of peace efforts and the renewal of military action (pp. 617-20).

The occupation of Japan was not primarily the responsibility of the Department of State but a substantial body of documentation printed in this volume illuminates the problems relating to the occupation, reparations, and trade developments. War crimes trials were being concluded and the purge against Japanese who had been active in the war effort was relaxed. With respect to the Japanese Government, the emphasis shifted from reform to stability. Revived economic activity was encouraged.

Documents of special interest in the section on Japan relate to "Recommendations With Respect to U.S. Policy Toward Japan." These include a report of March 25 on this subject by George F. Kennan, Director of the Policy Planning Staff (pp. 691-719), and one of October 7 by the National Security Council (pp. 858-65). The Acting Political Adviser in Japan, W. J. Sebald, reported on the war crimes judgment by the International Military Tribunal for the Far East. (pp. 898-907).

1948 was a crucial year for Korea. It was the announced policy of the United Nations, backed by the United States, to establish an independent government of Korea and to end military occupation both by the United States and the USSR. Elections were to be held under observation of the UN Temporary Commission on Korea (UNTCOK). In the North under Soviet Russian occupation a puppet "Democratic Peoples Republic" was established and UNTCOK was denied access to conduct an election. In the South, which contained two-thirds of the Korean population, elections of a National Assembly were held May 10 under UNTCOK observation. The Assembly met, established a government, and elected Syngman Rhee President. Pending UN action the United States did not officially recognize the new government but sent John J. Muccio, with personal rank of Ambassador, to negotiate with it.

Despite what the U.S. Commanding General in Korea, John R. Hodge, described as "foot-dragging and vacillation tactics" by some of the members of UNTCOK, the UN General Assembly finally adopted on December 12 a resolution recognizing the Republic of Korea as a government established by a free election observed by a UN committee in an area which included a large majority of the people of Korea and as the only such government in Korea. A statement by President Truman announcing official recognition by the United States, using the terminology of the UN General Assembly resolution, was released in Washington and Seoul on January 1, 1949.

This volume also contains brief sections on Australia, New Zealand, the Pacific Islands, the Philippines, and Siam.

In an effort to save space, the compilers of *Foreign Relations* have adopted a practice of omitting documents which have already been published, giving citations, especially to the Department of State *Bulletin* and to UN published records. In the volume under review key documents in the sections on the Netherlands East Indies and on Korea have been given this treatment. In such cases the saving of space seems inconsequential and the value of the volume would have been considerably enhanced if such documents had been included.

E. R. PERKINS

### BRIEFER NOTICES

*Studies on International Law. Volume Two.* By the Bulgarian Association of International Law. (Sofia: Publishing House of the Bulgarian Academy of Sciences, 1974. Pp. 134. Leva 1,54.) The burgeoning literature on international law produced in Eastern Europe includes a significant number of contributions published in Bulgaria, some of which are listed in the Preface to this volume. The second in a series, this volume contains seven articles, two in English and five in French.

Perhaps of greatest current interest is the article "Establishment of a Special International Statute of the Semi-Enclosed Sea," by P. Staynov (p. 29), in which the author develops some proposed legal implications of the concept of the "semi-enclosed sea." The discussion of this concept is less than crystal clear, but the term apparently means an area of water on a level with the ocean, connected with the latter by a single strait less than 24 miles wide, and bordered by a small number of states (pp. 30, 33). Furthermore, the author seems to limit the concept even more narrowly: "... where the strait is narrower than 24 miles, but its shores belong to more than one state, this surface . . . cannot *de plein droit*, be recognized as having the character of a 'semi-enclosed' sea except if under customary or conventional international law . . . provisions are made for a special treatment of this sea-water area in certain respects" (p. 34). The author seems to recognize that under existing general international law semienclosed seas, beyond the territorial sea, remain parts of the high seas (pp. 34, 36). However, in the light of the current processes of change in the law of the sea, he pleads for the adoption of a special international "statute" for semienclosed seas which would serve as a framework for more specific regulations appropriate for each such sea, primarily through agreements between littoral states. He concludes by considering the situation of two particular semienclosed seas—the Black and the Baltic.

Another article of some general interest, but on a different level of abstraction, is that by Professor Radoynov on some methodological problems of research on the "domestic jurisdiction" of states (p. 41). The author's approach, based on what he calls "realistic dualism" (p. 44), is positivist. Regarding the concept under discussion as having both legal and political meanings, he asserts that matters within the domestic jurisdiction of a state in the legal sense are those "which national law has not yet transferred over to international law for regulation" (pp. 54-55).

An article by Academician Kaménov in French compares COMECON and the European Economic Community (p. 13) to the disadvantage of the latter (chiefly because it places greater restrictions on the sovereignty of its members and permits discrimination against nonmembers). Other articles in French, of more specialized interest, deal with collective security treaties between Bulgaria and other socialist states, obligations of members and international control of activities of the ILO, certain aspects of the law of international sale of goods, and the principle of national regime with respect to inventions.

O. J. LISSITZYN

*Pojęcie Państwa w Prawie Międzynarodowym.* By Lech Antonowicz. (Warsaw: Państwowe Wydawnictwo Naukowe, 1974. Pp. 165. Index. Zł.22.) The author's objective is to find an adequate definition of the state as a subject of international law. He analyzes such difficult to classify phenomena as personal and real monarchical unions, confederation and federal states (if the component parts of a federal state retain a residual right to conclude international agreements, as is theoretically the case of the Soviet Union Republics), and protectorates. In each such case he investigates the question whether such geopolitical entities retain the right to act internationally and hence remain states in the sense of international law.

He does not include West Berlin as a part of either of the two German states and considers that it is not a state according to international law (p. 86). He concedes statehood to the Holy See, but wrongly thinks that the Holy See and the City of the Vatican are an identical legal entity (p. 89). In fact, the Vatican City as such has legal relations with Italy, while it is not that City but the Holy See which concludes concordats with states regarding the rights and duties of Catholic churches. Each is a distinct subject of international law.

While accepting the usual view that population, territory, and government constitute the indispensable elements of the state, he is right in pointing out that the existence of these three elements does not suffice to make a geopolitical entity a state in the sense of international law; other entities such as a city or a county also contain those elements. He, therefore, adds a fourth factor, the state's independence which he also calls "sovereignty." Sovereignty in his interpretation means the right to conclude treaties, to have diplomatic and consular relations, and to become a member of international organizations. Recognition by other states is not necessary for the existence of a new state as a fact but is the precondition of its becoming a subject of international law (a sort of combination of the declaratory and constitutive theories of recognition).

His book is founded on the available literature (Western, Polish, and Soviet), but is not an original contribution to that literature.

W. W. KULSKI

*Grotian Society Papers 1968.* Edited by C. H. Alexandrowicz. (The Hague: Martinus Nijhoff, 1970. Pp. 232.) Increasing interest has been manifested of late in the field of legal history. The history of international law is a branch of that field which likewise deserves greater attention. The Grotian Society, formed by a group of lawyers to promote interest in that topic, had previously published a collection of papers in India; it now offers in the present volume the first publication in Europe of a dozen

studies owing their genesis to its activities devoted to the history of international law.

The first paper, by Professor D. P. O'Connell, concerns territorial claims in the Grotian period. It argues that it was not until Vattel and the French revolution that the alienability of state territory was generally accepted. Another paper, by Elizabeth Evatt, deals with British acquisition of sovereignty in Australia and New Zealand. Others discuss a war crimes trial in 1474; the limits of the duty of obedience to the state; self-determination; natural sanctions of international law; Utopian international organizations; piracy in Malayan waters; early English restrictions on travel; relations between the British East India Company and the Crown; and the pacification of Ireland in 1691 by the treaty of Limerick. Many interesting historical aspects of international legal relationships are brought to light by the eminent contributors to this volume.

EDWARD DUMBAULD

*Documents on the International Court of Justice.* Shabtai Rosenne (ed.). (Leiden: A. W. Sijthoff; Dobbs Ferry: Oceana Publications Inc., 1974. Pp. xii, 391.) In addition to the usual documents—the Charter of the United Nations, the Statute and Rules of Court, the Resolution on Internal Judicial Practice of July 8, 1968, all in French and English—this useful compilation contains lists of parties to the Statute, resolutions of the General Assembly on Participation of States not Members of the United Nations in the election of Judges and in amending the Statute and resolutions of the Security Council on Access to the Court of States not Parties to the Statute, resolutions on privileges and immunities of the Court (including the letter from the Minister for Foreign Affairs of the Netherlands to the President of Court of February 26, 1971, settling the question of precedence to the satisfaction of the Court), and resolutions relating to the recent Review of the Role of the Court. The cutoff date being December 31, 1973, Resolution 3232 (XXIX) of November 22, 1974, which concluded the review, is not reproduced.

Dr. Rosenne provides the text of all declarations accepting the compulsory jurisdiction of the Court as well as the surviving declarations made in relation to the Permanent Court of International Justice. It would be important to know which of these old and new declarations are in force, but that is not indicated in all cases. There are resolutions of the UN General Assembly authorizing other organs of the United Nations and organs of specialized agencies to request advisory opinions. Tables show the composition of the old and new Court, its finances, salaries, and pensions; judicial statistics are also set out.

A narrative section on elections to the Court is particularly interesting. It shows not merely the gradual shift in the geographic composition of the Court but the often tortuous process of election in the General Assembly and the Security Council, of which Articles 8, 11, and 12 of the Statute became the early victims. At the prolonged 1966 election, the President of the Security Council announced the withdrawal of a candidate and in the General Assembly "the representative of Guinea announced the withdrawal of the candidate of his own nationality" (p. 348). Was the candidate present at the voting in the Security Council? Did the representative have full powers to withdraw (and perhaps to nominate?) the candidate from his country? And if the number of nominations for five places drops to 12 of whom four withdraw before the election, the members of the Assembly and the Council do not seem to have the choice envisaged in Articles 2, 6, and 9 of the statute.

The table on voting in the Court in contentious and advisory cases indicates the position of the national titular and *ad hoc* judges and the number of declarations, separate and dissenting opinions, and the reader can draw his own conclusions. The printing errors in the table (on pp. 376, 377, 379, 381) will no doubt be corrected in the next edition of this useful and comprehensive handbook.

LEO GROSS

*The Thin Blue Line: International Peacekeeping and Its Future.* By Indarjit Rikhye, Michael Harbottle, Bjørn Egge. (New Haven and London: Yale University Press, 1974. Pp. xvi, 353. Index. \$12.50.) The authors are professional soldiers each with broad and unique experience in the field of international peacekeeping operations and long service in the military establishment of his country. The book is candid, refreshing and direct. Within the limited space provided one can touch only briefly on a few of the more important ideas advanced by the writers to enhance the effectiveness of international peacekeeping machinery.

The idea that the "Secretary-General should be given a military staff with the management of peacekeeping operations" has been "firmly rejected . . ." say the authors. To put it mildly, the Secretary-General does not desire to incur the displeasure of some of the members of the Security Council "whose ostrich-like prejudice is just one of the many stumbling blocks that will need to be removed before an effective machine can be developed." Although the authors do not tell us how they would overcome this prejudice, they nevertheless proceed to outline the strengthening of UN peacekeeping machinery by what they call "a bank" of ideas. "What is impossible today because of political constraints," to quote them, "may be possible tomorrow in different world political circumstances."

Preplanning for peacekeeping operations in the light of the political climate within the United Nations, they say, can only be in very broad terms. They suggest that the study of organizations and logistical design is a possible area in which the Military Staff Committee might be expected to operate. Or, the plan could be undertaken by an interprofessional group under the Secretary-General. Such preplanning, they believe to be "perfectly possible without disturbing any political dovetails." The problems connected with a UN peacekeeping operation warrant a separate staff element to cope with them at the highest political level. Clearly the staff should be advisory to the Secretary-General and primarily responsible to the Security Council. They stress the need for a staff, expert in the political, legal, economic, social, and numerous military aspects of peacekeeping, and they believe their proposal to be within the framework of the Charter.

In the concluding chapter, the authors ascribe great importance and significance to the creation of UNEF II, which followed the outbreak of war in the Middle East on October 6, 1973. They contrast the Israeli acceptance of UNEF II, with the refusal to accept UNEF I in 1956; the participation of Poland, the first Warsaw Pact member to serve in a United Nations peacekeeping force; and the first participation of the Soviet Union in a UN observation mission. It is too early to venture a meaningful evaluation of UNEF II and to project the impact of this operation upon the future course of international peacekeeping operations in general. The authors, however, are confident that the United Nations can mount an effective emergency peacekeeping operation and that such operations in the future can be created so long as the superpowers are in agreement.

DAVID W. WAINHOUSE

*Gewaltverbot und Repressalien.* By William Griffith Hester. (Ludwigsburg: Walter-Verlag GmbH, 1973. Pp. xvi, 217. DM 34, cloth; DM 28, paper.) The author of this book offers a systematic treatment of the implications of Article 2(4) of the United Nations Charter, which calls upon member states to "refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations." This effort is justified, the author not improperly acknowledges, because much of the literature on the use of force has focused on case studies rather than on a systematic examination of problems related to the prohibition of force and to the use of reprisals. The book itself falls somewhere between an essay and an introductory text. The substantive scope is comprehensive, and an effort is made to acknowledge conflicting viewpoints relating to controversial legal problem areas. Critics, however, may feel that the study is too superficial in some areas and that the review of the literature is not as exhaustive as it might have been.

This study reviews briefly the lengthy historical development of the legal principle concerning the prohibition of force embodied in Article 2(4). The author then examines such issues as the subjects covered by the prohibition, as well as the objects of protection; special forms of force; justified uses of force (*e.g.*, under Articles 51 or 53 of the UN Charter); and reprisals and other retaliatory measures. The goal throughout is to ascertain the consequences of Article 2(4), of the right of self-determination, and of human rights in each of the substantive categories examined.

FOREST L. GRIEVES

*L'Interdiction de l'Emploi de la Force en Droit international.* By Jaroslav Žourek. (Leiden: A. W. Sijthoff, 1974. Pp. 155. Appendix. Selected Bibliography.) This slim volume is part of a series of publications undertaken by the Henry Dunant Institute in Geneva in an attempt to make available to a wider audience the lecture series on the law of war conducted by l'Institut International des Droits de l'Homme at the Université de Strasbourg during the summer.

Professor Žourek begins by calling attention to the close relationship between armed conflict (whether international or domestic) and human rights. All armed conflict, he notes, results in the denial of certain essential human rights, such as the right to life. He cites General Assembly resolution 2852 (XXVI) of December 20, 1971, to the effect that the maintenance of international security constitutes the best guarantee of human rights.

The substance of this book is a readable general survey of the evolution of the prohibition of the use of force in international law. The author reviews the historical origins of ideas concerning the control of armed conflict and traces that history through the Versailles Peace Conference, the League of Nations, the Briand-Kellogg Pact, and the United Nations. He also focuses on selected problem areas such as disarmament, defining aggression, the authorized use of force under the UN Charter, and whether force may be employed to stop violations of human rights. He concludes that the prohibition of the right to go to war (*ius ad bellum*) and the solidification of the parallel principle of an obligation to employ pacific means to settle disputes, while having finally been established are made less than effective by the tenor of modern international relations. He feels that well-informed national and international public opinion offers eventual hope for realizing these principles.



Although Professor Žourek makes a disclaimer concerning problems of superficiality because of the limitations of the lecture series, advanced students of international relations are nevertheless likely to wish that sections of the book had received further amplification and discussion.

FOREST L. GRIEVES

*Conflict and Compromise: The Strategy, Politics and Diplomacy of the French Blockade, 1914-1918.* By Marjorie Milbank Farrar. (The Hague: Martinus Nijhoff, 1974. Pp. 216. Gld. 35.) The attempt by the Allies of 1914 to deprive the Central Powers of economic support for their war effort involved British naval interdictions based on traditional concepts of "blockade." Professor Farrar examines the way in which this original pattern changed to admit newer forms of "economic warfare" within the legal order of Europe of the time. Since every attempt to extend the rights of the Allies was an encroachment on what was conceived at the time to be the rights of neutrals to trade with each other and, in non-contraband, with belligerents, measures that avoided antagonizing neutrals, such as preclusive buying, were tried, and there was much Allied diplomatic activity seeking neutral cooperation in limiting trade with Germany. Strong commercial interests in each country were affected, as well as fundamental legal and economic interests of articulate neutrals such as Switzerland, The Netherlands, the Scandinavian states, and the United States.

The British penchant lay towards naval blockade with ever-increasing lists of forbidden goods. The French penchant was for embargo, using diplomatic and other pressures to require each country to limit its own trade with Germany. The German unrestricted submarine warfare declared on January 31, 1917, was impliedly an acceptance of the legitimacy of the British approach. The U.S. entry into the war in April of that year supported the French approach, as the most powerful trading country in the world sought to achieve its new belligerent aims in a way consistent with its legal orientation as a neutral just a short time before. American economic pressures forced the remaining neutrals to agree to embargo measures aimed against the Central Powers thus, under classical international law, violating their obligations as neutrals. Various ways to avoid this legal conclusion were tried, but were seen even then as mere subterfuge.

Professor Farrar relies heavily on French sources, while not neglecting the more familiar English and American publications, and has done a solid job unraveling the threads tangled together in this small but important part of the fabric of the international law of war.

ALFRED P. RUBIN

*International Safeguards and Nuclear Industry.* Edited by Mason Willrich. (Baltimore: Johns Hopkins University Press, 1973. Pp. ix, 307. Appendices. Index. \$11.50.) As indicated in the foreword, this book is the result of a study carried out under the auspices of the Panel on Nuclear Energy and World Order of the American Society of International Law. In 1971 the panel established a working group of eight experts under the direction of Mason Willrich. These experts produced an outstanding study of the safeguards system in the context of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT) and the International Atomic Energy Agency (IAEA), the so-called IAEA/NPT safeguards system, a matter of great importance and lasting interest. It is worth noting

that more than one hundred states are parties to the Statute of IAEA, and more than eighty states are parties to the NPT.

Henry D. Smyth writes about the need for international safeguards. Bernhard G. Bechhoefer deals with the historical evolution of international safeguards. Mason Willrich presents an analysis of nuclear industry. On the question of safeguards against nuclear diversion, Paul C. Szasz makes a study of the IAEA safeguards, and Edwin M. Kinderman deals with national safeguards, and industrial implications of safeguards. Victor Gilinsky and Theodore H. Taylor analyze in two separate chapters the serious problem of diversion of civilian nuclear materials and facilities to nuclear weapons, diversion by national governments and nongovernmental organizations. Lawrence Scheinman presents some thoughts about the political implications of safeguards.

Under Article I of the NPT each nuclear-weapon state party to the Treaty is required not to transfer to any recipient whatsoever nuclear weapons or other nuclear explosive devices or control over nuclear weapons or explosive devices. Under Article III each nonnuclear-weapon state party to the Treaty undertakes to accept safeguards, as set forth in an agreement to be negotiated and concluded with IAEA in accordance with its Statute and the Agency's safeguards system, for the purpose of verifying the fulfillment of its obligation under the Treaty with a view to preventing diversion of nuclear energy from peaceful uses to nuclear weapons or other nuclear explosive devices. Furthermore, each state party to the Treaty is required under the same Article III not to provide source or special fissionable material, equipment, or material specially designed or prepared for the processing, use, or production of special fissionable material, to any nonnuclear-weapon state for peaceful purposes, unless the source or special fissionable material shall be subject to the said safeguards.

These and several other questions are well treated in the different chapters of the book. Of special interest is the extensive and clearly written chapter by Paul C. Szasz on the IAEA safeguards. He has written other works on the subject and has a long experience in dealing with legal problems of intergovernmental organizations. The book is a serious and excellent contribution to the understanding and knowledge of highly complex and important problems.

ISIDORO ZANOTTI

*Pravovye problemy svobody nauchnykh issledovaniy v mirovom okeane.* By A. F. Vysotskii. (Kiev: izd-vo Naukova dumka, 1974. Pp. 159. 89 kop.) This is the first Soviet monograph devoted to legal aspects of scientific research at sea. It is concerned primarily with the legal principles for carrying on research. Chapter 1 considers the place of the freedom of scientific research in the general principle of freedom of the seas. The author objects that a restrictive interpretation of Article 2 of the Geneva Convention on the High Seas would seriously impede the development of new peaceful uses of the seas, taking particular issue with the thesis that the four named freedoms of the seas are "basic" and others by implication are secondary (and notes an error in the Russian text of the commentary to draft Article 27 lending support to his thesis). He also opposes broad interpretations of Article 2 attributed to McDougal-Burke and based on the reasonable interests of other users of the sea (taking particular exception to nuclear tests at sea and pirate radio stations). In the author's view, any use is admissible provided that it is not contrary to the "principles and rules of prevailing international law." He sees the approval of

oceanographic research programs by international organizations without objection as a "weighty argument" that the freedom of scientific research has been recognized by states.

Chapter 2 reviews a number of proposals in the UN Seabed Committee relating to scientific research, including the Maltese, Canadian, and American drafts. The Soviet position that research having the "express purpose of industrial exploitation" should be prohibited is discussed, but the problems of differentiating purposes of research are passed over lightly and the author is hardly convincing when he attributes coastal state apprehensiveness over research to nuclear testing.

In Chapter 3 the "spatial sphere" of the principles of freedom of scientific research is confined to all areas of the high seas (surface, water column, and seabed). Strong exception is taken to proposals that the territorial sea should fall within this sphere, and a multilateral disposition of the issue is dismissed as unacceptable. At the same time, concern is expressed over territorial seas exceeding twelve miles, and there is an extensive critique of patrimonial sea concepts. The history of the relevant articles of the Convention on the Continental Shelf is recounted, Article 5(8) being singled out as requiring clarification; though the author himself advances no suggestions.

W. E. BUTLER

*Alternative arrangements for Marine Fisheries: An Overview.* By Francis T. Christy, Jr. (Washington: Resources for the Future, Inc., 1973. Pp. ix, 91.) *North Pacific Fisheries Management.* By Hiroshi Kasahara and William Burke. (Washington: Resources for the Future, Inc., 1973. Pp. xiv, 91.) The two books reviewed here are part of a series on fisheries management problems prepared for the use of representatives to the UN Third Conference on the Law of the Sea. The series was sponsored by Dr. Francis Christy, Director of Resources for the Future, Inc. The other separate studies are: *West African Marine Fisheries* (No. 3, J. A. Crutchfield and R. Lawson); *Alternative International Institutions* (No. 4, E. Miles); *Indian Ocean Fisheries* (No. 5, A. R. Tussing, R. A. Hiebert and J. G. Sutinen); *World Tuna Fisheries* (No. 6, S. B. Saila and V. J. Norton). The studies provide useful background information on recent developments and discuss alternative legal and institutional arrangements for the different species (coastal, sedentary, anadromous, and highly migratory) in different regions. On the whole, the studies are objective and take into account all responsible points of view and interests. They should be as useful to anyone else who is interested in fisheries management as to the delegates to the Law of the Sea Conference.

In his stimulating review of the fisheries problems, Dr. Christy argues that freedom of fishing has resulted in a growing record of depletion of fishery stocks and increasing conflicts over scarce resources and that these situations point to the need for management measures and for the removal of free and open access. A much greater degree of authority and control than has been available in the past is required. Large and exclusive rights over coastal areas (e.g., an economic zone) will not eliminate completely, in his view, the needs for joint management between neighboring states and other interested states, since fish do not observe any manmade boundaries. The most useful contribution of his study lies in the discussion of the various management techniques and their benefits and costs, which should serve as a useful guide to decisionmakers. Some of the general considerations of fisheries arrangements discussed in the

last chapter of his study have already found their way into the proposals before the Conference. Whether they will become law remains to be seen. His suggestion that the Conference should concentrate on the question of fisheries jurisdiction and leave aside the question of benefit sharing to regional arrangements in view of their diversified situations is a wise one. There are indications of such an approach. Dr. Christy's study is based on the major premise that the question of management should and can be treated separately from that of benefit sharing. Although this should be so, the two questions are in political terms inseparable, and few coastal states would accept his premise.

The joint study of Dr. Kasahara and Professor Burke deals with the North Pacific Fishery region. This region includes some of the most highly productive fisheries as well as the strongest fishing states and is subject to complicated fisheries arrangements. On the assumption that the Law of the Sea Conference is unlikely to reach an effective agreement on solving regional problems of fisheries, the authors propose the establishment of a new and comprehensive institution for the North Pacific region. The study considers the means for transforming the multitude of existing arrangements into a new institution and examines the composition and operation of such an institution. The authors consider that the major living resources in the North Pacific region, except for salmon and crab, will not present unsurmountable problems in assimilation within the proposed new framework. In 1972 there were indications that such an approach was feasible for that region. The timing however seems to have passed. Nevertheless, the study is well done and will continue to be useful.

R. S. LEE

*Federalism and Supreme Courts and the Integration of Legal Systems.* Edited by Edward McWhinney and Pierre Pescatore. (Heule, Belgium: Editions UGA. 1973. Pp. xii, 266.) This collection of papers on the integrative role of the judiciary grew out of the 1972 Summer Seminar of the International University of Comparative Studies in Luxembourg. Primarily, comparative rather than international lawyers will find it interesting, since the papers relate specifically to West Germany, Italy, Belgium, the Netherlands, Switzerland, and Yugoslavia. In addition, Professor McWhinney examines the role of judicial policymaking as exemplified by courts in the civil and common law systems, while Professor Graveson looks at the conflict of laws in nonunified legal systems. His references to English, Scottish, and Isle of Man deviations lead one to think that in this sphere Great Britain might have some resemblance to a federal system.

The principal aim of the seminar was to consider the contribution to integration likely to be made by the European Court, and in this connection it is important to bear in mind Professor McWhinney's assertion that the European approach has been functional, rather than constitutional and institutional. He feels that the input of common law consequent upon Britain's entry could either advance or impede the "process of political-legal accommodation and cross-fertilization or ultimately perhaps of unification," and that to some extent whether the result is positive or negative might well depend upon the extent to which the Court is willing to act as if it were a supreme court in a federal system (p. 3). From this point of view, it is interesting to note Professor Friedrich's suggestion that the Court should be prepared to draw precedents from other federal systems (pp. 30-1), especially as he believes a parliament to be essential for the development of European law with the emphasis on statute rather than common law (p. 28). It is important, however, to bear in mind that

Europe is not as yet a federation, and Judge Pescatore maintains that the law of the Community is neither international nor municipal, but integrative, and that, while the Community is not a state, in its own spheres of operation it is above the member states and its organs seek to provide legal rules common to all its members (p. 8). (This argument is elaborated in his *Law of Integration*, 1974). Professor Kovar, too, is concerned with European integration, but it is submitted that his approach is somewhat in the nature of special pleading: "The relations between economic or political and juridical integration are both intimate and reciprocal. Political integration necessarily implies juridical integration, while the integration of juridical systems contributes to the realization of politico-economic integration" (p. 218). He also seems to place too much emphasis on form. While it may be true that on paper there is no hierarchic relation between the European and national courts (p. 221), he himself agrees that an interpretative judgment by the former is binding upon the municipal court to which it is addressed (p. 240).

The general impact of these essays is that much will depend upon the willingness of national courts to follow and cooperate with the European Court. Perhaps it is still too early to make any dogmatic assessment in this respect. However, the English courts have already shown a tendency in this direction and in his *Law of Integration* Judge Pescatore indicates that this is becoming increasingly the position throughout the Community.

L. C. GREEN

*Die Vereinbarkeit des Vertrages zur Gründung der europäischen Wirtschaftsgemeinschaft mit der britischen Verfassung.* By Klaus Thelen. (Köln, Berlin, Bonn, München: Carl Heymanns Verlag KG, 1973. Pp. x, 292. Bibliography. Index.) This monograph, originally submitted as a dissertation within the Law Faculty of the University of Cologne, is part of the Cologne Series on European Law. In fact, it is the second study by a West German author to appear on the same general theme within the space of several years.<sup>1</sup> Dr. Thelen's study contains a systematic and painstaking examination of the British and Commonwealth constitutional law literature on the concept of the sovereignty of the British Parliament at Westminster and its ability, and also that of the Parliaments historically derived from it within the contours of the old British colonial Empire, to limit their lawmaking authority for the future. As such, we have an extended *reprise* of the Anglo-Irish cases of fifty years ago, the Anglo-Scottish and Union of South Africa cases of twenty years ago, the New South Wales (Australia) cases of forty years ago, and so on. It is all very competently done, and the lost British constitutional debates of yesterday and the day before yesterday, including a number in which the present reviewer participated, are revived to decide whether the British Parliament can today constitutionally limit itself for purposes of the British entry into the European Communities. The answer today remains, of course, the same as before. For such fundamental questions are in essence political and not legal—Kelsen's *pre-legal* or *meta-legal Grundnormen*. The British governmental decisions are all to be made on grounds of high policy, and the courts and all other official institutions will adjust pragmatically to those political decisions, without feeling themselves to be too constrained by essentially abstract, *a priori* issues of constitutional-legal principle.

EDWARD MCWHINNEY

<sup>1</sup> See PETERSMANN, DIE SOUVERÄNITÄT DES BRITISCHEN PARLAMENTS IN DEN EUROPÄISCHEN GEMEINSCHAFTEN (1972) reviewed by this reviewer in 67 AJIL 810 (1973).

*Canadian Conflict of Laws.* By Jean Castel. (Toronto: Butterworths, 1975. Pp. xxv, 800. \$65.00.) As its title suggests, this book is directed primarily to Canadian law. Frequent reference is also made to the law of England, but relatively scant attention is paid to that of the United States, undoubtedly because in the author's opinion Canadian "conflict of laws" rules are much closer to the United Kingdom model than they are to [that] of the United States . . . In part for this reason, the book should prove of particular interest to readers in the United States. In some respects, Canadian rules of conflict of laws are quite different from those in the United States. The book gives an excellent description of these rules and also provides us with a good yardstick against which to evaluate our own rules.

The book is intended to be the first of three. It opens with a general introduction to conflict of laws and then goes on to deal in detail with the jurisdiction of the Canadian common law courts, with the recognition and enforcement of foreign judgments and arbitration awards, and with procedure. The next projected volume, which will also be written in English, will deal with choice of law in the common law provinces of Canada. The third volume, to be written in French, will be concerned with conflict of laws in Quebec. The work, once it has been finished, will undoubtedly be the most complete, the most authoritative, and the best exposition of Canadian conflict of laws.

Limitations of space do not permit a detailed discussion of the contents of the book. So far as a reader from the United States can judge, it provides excellent coverage of all the subjects covered. On occasion, it discusses in real depth a relatively obscure topic. An example is the time element in conflict of laws which, to date, has rarely figured in cases decided by courts in the United States. The problem has arisen more frequently elsewhere and has been discussed by a number of foreign authors. Any interested person should certainly consult the present volume. The author has rendered, and is in the course of rendering, a real service to the legal profession in Canada and the United States.

WILLIS L. M. REESE

*U.S. China Policy and the Problem of Taiwan.* By William M. Bueler. (Boulder: Colorado Associated University Press, 1971. Pp. 143. Index.) Despite the drastic change in United States policy toward China and Taiwan (Formosa) subsequent to the publication of this book, the recommendations it contains appear as cogent and pertinent as ever. The questions of who owns Taiwan and of what its future should be remain controversial. The thrust of the author's recommendations is that the future of Taiwan should be decided by all its inhabitants in accord with the principle of self-determination under international law.

Appropriately, the author emphasizes that the question of Taiwan should be approached in its own right, and not as an appendage of the Chinese civil war rhetoric of Mao and Chiang. He examines the trend of U.S. policy toward Taiwan and China through the successive administrations of Truman, Eisenhower, Kennedy, Johnson, and Nixon (the predetente phase) and highlights the factors, both internal and external, that conditioned the trend of decisions. He challenges the "old assumptions" underlying the U.S. commitment to the Chiang regime and urges a constructive policy to promote the common interest in the light of the "new realities." Mr. Bueler calls particular attention to the imperative need of according the utmost deference to the genuine aspirations of the Taiwanese people, as of other peoples. These aspirations are frequently overlooked or slighted in other explorations about the status and future of Taiwan. "If the

Taiwanese were given self-determination," the author concludes, "the United States would no longer have to contend with the salient contradiction inherent in the present policy—that of trying on the one hand to improve relations with China, and on the other of supporting a GRC [the Nationalist Chinese regime] that claims the right to overthrow the government in Peking." This lucidly written and persuasively reasoned book deserves wide and serious attention by scholars and decisionmakers alike.

LUNG-CHU CHEN

*Foreign Enterprise in Japan: Laws and Policies.* By Dan Fenno Henderson. (University of North Carolina Press, 1973. Pp. xvii, 574. \$17.95.) Professor Henderson's book is the first comprehensive guide for the perplexed foreign businessman considering operations in Japan, although the literature on particular topics has been growing in both quality and quantity. Because of the importance of the market involved and the difficulty of the linguistic and cultural barriers hurdled, this work is a worthy conclusion to the series of country guides sponsored by the American Society of International Law.

The first two parts of the book present a background view of the Japanese economy, business, and legal system; the third describes the system for controlling foreign business entry into Japan plus some basic issues of Japanese contract law and rules pertaining to arbitration. Some important topics, such as taxation, are wholly omitted and others, such as antitrust, are distributed through the book as they become relevant.

As far as one not expert in Japanese matters can tell, the research is exhaustive and the reporting accurate. The author delayed publication long enough to take account of the "Nixon Shock" and of Japanese liberalization moves in 1971 and 1973, but, through no fault of the author's, the 1974 rise in the price of Japan's enormous imports of oil is already affecting much of what he has written.

For one whose main interests and knowledge relate to other parts of the globe, a major utility of the book is the opportunity to compare Japan's policy with those of other developed countries which have also tried to curb the entry of foreign, chiefly American, capital. Japan has been seen as the most successful in this, arousing the envious interest of the Canadians in particular.<sup>1</sup> The Canadians have only very recently put into effect a general scheme of curbs on foreign takeovers. The older French program is also based on exchange controls and encounters the same problems under treaty law as does the Japanese.<sup>2</sup> The book indicates that the greater success of the Japanese may owe something to administrative skills, in particular to the close collaboration between Japanese bureaucrats and businessmen, but this talent would be of little avail to another country that does not possess the basic economic strengths of Japan, its capacity to do without foreign investors, and thus to admit them only on its own terms.

This book would be an easier guide to Japan if an independent editor had taken the manuscript firmly in hand. The structure of the book is not always logical in its progression and not always even consistent with its headings. Quite a few sentences are entries in the nonstop sentence

<sup>1</sup> See FOREIGN OWNERSHIP AND THE STRUCTURE OF CANADIAN INDUSTRY 379-81 (1968) (the so-called "Watkins Report") and McMillan, *After the Gray Report: The Tortuous Evolution of Foreign Investment Policy*, 20 McGill L.J. 212, 256-57 (1974).

<sup>2</sup> See Torem & Craig, *Control of Foreign Investment in France*, 66 Mich.L.Rev. 669 (1968); and *Developments in the Control of Foreign Investment in France*, 70 id. 285 (1971).

derby. On others one feels the author nodded: surely name cards are not one of the "physical delights of Japanese culture" (p. 100). Nonetheless, the reader who persists with this book will find himself rewarded with much that is new and interesting.

DETLEV F. VAGTS

*Polish Yearbook of International Law, Volume V, 1972-73.* (Wrocław, Warsaw, Kraków, Gdańsk: Ossolineum, 1974, for the Polish Academy of Sciences. Pp. 334. Zł.90.) As time goes by this highly useful and lively publication (in English and French) continues to contribute importantly to our knowledge of jurisprudential trends in the Polish literature of international law. Volume V consists of three parts: articles, book reviews, and a bibliography of writings on international law that appeared in Poland in 1971. Topics covered in the volume include the law of the economic relations of the COMECON, specialization agreements within the socialist bloc, the deep seabed, the continental shelf in the Baltic sea, pollution, codification of the law of armed conflicts, human rights, extradition of criminals, functions of international organizations, creation of subsidiary agencies in international organizations, developments in the law of carriage by air, German air operations in Poland in 1939 in the light of international law, and consular protection through third states.

While the issues and legal problems discussed in the *Yearbook* suggest the country or origin, the approach and the method are universal. Some of the contributions raise theoretical and practical problems of extreme interest, arising out of the fact that certain developments in the socialist system take place within an environment in which the state is both the owner of the means of production and the territorial sovereign. One of the authors, Waskowski, in *Legal Regulation of Economic Relations within the Council for Mutual Economic Assistance* (pp. 7-27) suggests a theory of the legal and economic integration of the COMECON countries, hinting that it could result in international and civil law merging into a single system. There is of course the unanswered question of what happens to the law of trade with capitalist countries? Does it also change its character? This suggestion has been firmly resisted until now.

KAZIMIERZ GRZYBOWSKI

*The Year Book of World Affairs, 1974.* Vol. 28. George W. Keeton and Georg Schwarzenberger (eds.). (London: Stevens & Sons, 1974. Pp. vi, 324. Index. £5.25. \$19.50.) A review limited to those articles of this *Year Book* which deal with international law and organization must be directed to six or seven of the twenty studies in the current volume. Two articles deal with developments in the laws of war. Yoram Dinstein discusses the two draft Additional Protocols to the 1949 Geneva Conventions resulting from the 1972 Conference of Government Experts convened by the International Committee of the Red Cross. His critical analysis of the First Protocol, on international armed conflicts, focuses on the great disparity of its subjects, which he regards as precluding its wide adoption, and on the special problems of its provisions regarding guerilla warfare and aerial bombardment. The still greater vulnerability of the Second Protocol, on conflicts not of an international character, emerges from the deeply controversial nature of its basic definition of such conflicts.<sup>1</sup> From

<sup>1</sup> For a critical report on the issues treated subsequently at the First Session of the Diplomatic Conference held in Geneva in 1974 which considered the I.C.R.C. drafts, see David P. Forsythe, *The 1974 Diplomatic Conference on Humanitarian Law: Some Observations*, 69 AJIL 77 (1975). The Second Session of the Conference convened on February 3, 1975. N.Y. Times, Feb. 4, 1975.



a very different perspective, Georg Schwarzenberger reflects on the general prospects for the laws of armed conflict in the light of the whole history of warfare, with the somber question whether, under the impact of present political, social, and technological trends, these laws may not become but a civilized interlude before the recrudescence of unlimited violence in a new barbarism.

International organizations are considered in two articles on international ecologic and economic law. Ambassador Edvard Hambro describes and evaluates the work of the 1972 Stockholm Conference on the Human Environment and its immediate aftermath and the difficulties ahead that are foreshadowed by the disagreement between industrialized and developing nations and by the dogma of sovereignty. Peter Goldsmith and Friedrich Sonderkötter, continuing the series on equality and discrimination in international economic law, look at the European Communities. They analyze the scope and effect of the provisions in the constituent treaties which prohibit discrimination within the Communities in the light of decisions of national and Community courts. External relations of the Communities are left for a later article. Considering the wider context of international organization, Jeffrey Harrod presents a thoughtful overview of the present predicaments common to the UN Specialized Agencies. He applies concepts of organization theory to illuminate the adverse impact within developing and industrial nations and within international bureaucracies of simultaneous changes in the political and intellectual environment. By contrast, Roderick C. Ogley and Michael H. Smith, writing on the outsider roles of outstanding nonmembers of the League of Nations and the United Nations, traverse familiar ground well trodden in the literature they cite.

Among the other articles, diverse in method and varying in quality, there is again a survey of the state of international studies, this year for the Soviet Union. John Goormaghtigh, who relies on publications in Western languages and on personal contacts, finds that the preoccupations of Soviet international lawyers, among others, have impeded the emergence there of empirical study.

KURT WILK

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## OFFICIAL DOCUMENTS

### UNITED NATIONS CONFERENCE ON THE REPRESENTATION OF STATES IN THEIR RELATIONS WITH INTERNATIONAL ORGANIZATIONS

#### CONVENTION ON THE REPRESENTATION OF STATES IN THEIR RELATIONS WITH INTERNATIONAL ORGANIZATIONS OF A UNIVERSAL CHARACTER \*

*The States Parties to the present Convention,*

*Recognizing* the increasingly important role of multilateral diplomacy in relations between States and the responsibilities of the United Nations, its specialized agencies and other international organizations of a universal character within the international community,

*Having in mind* the purposes and principles of the Charter of the United Nations concerning the sovereign equality of States, the maintenance of international peace and security and the promotion of friendly relations and co-operation among States,

*Recalling* the work of codification and progressive development of international law applicable to bilateral relations between States which was achieved by the Vienna Convention on Diplomatic Relations of 1961, the Vienna Convention on Consular Relations of 1963, and the Convention on Special Missions of 1969,

*Believing* that an international convention on the representation of States in their relations with international organizations of a universal character would contribute to the promotion of friendly relations and co-operation among States, irrespective of their political, economic and social systems,

*Recalling* the provisions of Article 105 of the Charter of the United Nations,

*Recognizing* that the purpose of privileges and immunities contained in the present Convention is not to benefit individuals but to ensure the efficient performance of their functions in connexion with organizations and conferences,

*Taking account* of the Convention on the Privileges and Immunities of the United Nations of 1946, the Convention on the Privileges and Immunities of the Specialized Agencies of 1947 and other agreements in force between States and between States and international organizations,

*Affirming* that the rules of customary international law continue to govern questions not expressly regulated by the provisions of the present Convention,

*Have agreed* as follows:—

#### PART I

#### INTRODUCTION

#### Article 1

##### *Use of terms*

1. For the purposes of the present Convention:

(1) "international organization" means an intergovernmental organization;

\* Done at Vienna, March 14, 1975.

(2) "international organization of a universal character" means the United Nations, its specialized agencies, the International Atomic Energy Agency and any similar organization whose membership and responsibilities are on a world-wide scale;

(3) "Organization" means the international organization in question;

(4) "organ" means:

(a) any principal or subsidiary organ of an international organization, or

(b) any commission, committee or sub-group of any such organ, in which States are members;

(5) "conference" means a conference of States convened by or under the auspices of an international organization;

(6) "mission" means, as the case may be, the permanent mission or the permanent observer mission;

(7) "permanent mission" means a mission of permanent character, representing the State, sent by a State member of an international organization to the Organization;

(8) "permanent observer mission" means a mission of permanent character, representing the State, sent to an international organization by a State not a member of the Organization;

(9) "delegation" means, as the case may be, the delegation to an organ or the delegation to a conference;

(10) "delegation to an organ" means the delegation sent by a State to participate on its behalf in the proceedings of the organ;

(11) "delegation to a conference" means the delegation sent by a State to participate on its behalf in the conference;

(12) "observer delegation" means, as the case may be, the observer delegation to an organ or the observer delegation to a conference;

(13) "observer delegation to an organ" means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the organ;

(14) "observer delegation to a conference" means the delegation sent by a State to participate on its behalf as an observer in the proceedings of the conference;

(15) "host State" means the State in whose territory:

(a) the Organization has its seat or an office, or

(b) a meeting of an organ or a conference is held;

(16) "sending State" means the State which sends:

(a) a mission to the Organization at its seat or to an office of the Organization, or

(b) a delegation to an organ or a delegation to a conference, or

(c) an observer delegation to an organ or an observer delegation to a conference;

(17) "head of mission" means, as the case may be, the permanent representative or the permanent observer;

(18) "permanent representative" means the person charged by the sending State with the duty of acting as the head of the permanent mission;

(19) "permanent observer" means the person charged by the sending State with the duty of acting as the head of the permanent observer mission;

(20) "members of the mission" means the head of mission and the members of the staff;

(21) "head of delegation" means the delegate charged by the sending State with the duty of acting in that capacity;

(22) "delegate" means any person designated by a State to participate as its representative in the proceedings of an organ or in a conference;

(23) "members of the delegation" means the delegates and the members of the staff;

(24) "head of the observer delegation" means the observer delegate charged by the sending State with the duty of acting in that capacity;

(25) "observer delegate" means any person designated by a State to attend as an observer the proceedings of an organ or of a conference;

(26) "members of the observer delegation" means the observer delegates and the members of the staff;

(27) "members of the staff" means the members of the diplomatic staff, the administrative and technical staff and the service staff of the mission, the delegation or the observer delegation;

(28) "members of the diplomatic staff" means the members of the staff of the mission, the delegation or the observer delegation who enjoy diplomatic status for the purpose of the mission, the delegation or the observer delegation;

(29) "members of the administrative and technical staff" means the members of the staff employed in the administrative and technical service of the mission, the delegation or the observer delegation;

(30) "members of the service staff" means the members of the staff employed by the mission, the delegation or the observer delegation as household workers or for similar tasks;

(31) "private staff" means persons employed exclusively in the private service of the members of the mission or the delegation;

(32) "premises of the mission" means the buildings or parts of buildings and the land ancillary thereto, irrespective of ownership, used for the purpose of the mission, including the residence of the head of mission;

(33) "premises of the delegation" means the buildings or parts of buildings, irrespective of ownership, used solely as the offices of the delegation;

(34) "rules of the Organization" means, in particular, the constituent instruments, relevant decisions and resolutions, and established practice of the Organization.

2. The provisions of paragraph 1 of this article regarding the use of terms in the present Convention are without prejudice to the use of those terms or to the meanings which may be given to them in other international instruments or the internal law of any State.

## Article 2

### *Scope of the present Convention*

1. The present Convention applies to the representation of States in their relations with any international organization of a universal character, and to their representation at conferences convened by or under the auspices of such an organization, when the Convention has been accepted by the host State and the Organization has completed the procedure envisaged by article 90.

2. The fact that the present Convention does not apply to other international organizations is without prejudice to the application to the representation of States in their relations with such other organizations of any of the rules set forth in the Convention which would be applicable under international law independently of the Convention.

3. The fact that the present Convention does not apply to other conferences is without prejudice to the application to the representation of States at such other conferences of any of the rules set forth in the Convention which would be applicable under international law independently of the Convention.



4. Nothing in the present Convention shall preclude the conclusion of agreements between States or between States and international organizations making the Convention applicable in whole or in part to international organizations or conferences other than those referred to in paragraph 1 of this article.

### Article 3

#### *Relationship between the present Convention and the relevant rules of international organizations or conferences*

The provisions of the present Convention are without prejudice to any relevant rules of the Organization or to any relevant rules of procedure of the conference.

### Article 4

#### *Relationship between the present Convention and other international agreements*

The provisions of the present Convention

(a) are without prejudice to other international agreements in force between States or between States and international organizations of a universal character, and

(b) shall not preclude the conclusion of other international agreements regarding the representation of States in their relations with international organizations of a universal character or their representation at conferences convened by or under the auspices of such organizations.

## PART II

### MISSIONS TO INTERNATIONAL ORGANIZATIONS

### Article 5

#### *Establishment of missions*

1. Member States may, if the rules of the Organization so permit, establish permanent missions for the performance of the functions mentioned in article 6.
2. Non-member States may, if the rules of the Organization so permit, establish permanent observer missions for the performance of the functions mentioned in article 7.
3. The Organization shall notify the host State of the institution of a mission prior to its establishment.

### Article 6

#### *Functions of the permanent mission*

The functions of the permanent mission consist *inter alia* in:

- (a) ensuring the representation of the sending State to the Organization;
- (b) maintaining liaison between the sending State and the Organization;
- (c) negotiating with and within the Organization;
- (d) ascertaining activities in the Organization and reporting thereon to the Government of the sending State;

- (e) ensuring the participation of the sending State in the activities of the Organization;
- (f) protecting the interests of the sending State in relation to the Organization;
- (g) promoting the realization of the purposes and principles of the Organization by co-operating with and within the Organization.

#### Article 7

##### *Functions of the permanent observer mission*

The functions of the permanent observer mission consist *inter alia* in:

- (a) ensuring the representation of the sending State and safeguarding its interests in relation to the Organization and maintaining liaison with it;
- (b) ascertaining activities in the Organization and reporting thereon to the Government of the sending State;
- (c) promoting co-operation with the Organization and negotiating with it.

#### Article 8

##### *Multiple accreditation or appointment*

1. The sending State may accredit the same person as head of mission to two or more international organizations or appoint a head of mission as a member of the diplomatic staff of another of its missions.
2. The sending State may accredit a member of the diplomatic staff of the mission as head of mission to other international organizations or appoint a member of the staff of the mission as a member of the staff of another of its missions.
3. Two or more States may accredit the same person as head of mission to the same international organization.

#### Article 9

##### *Appointment of the members of the mission*

Subject to the provisions of articles 14 and 73, the sending State may freely appoint the members of the mission.

#### Article 10

##### *Credentials of the head of mission*

The credentials of the head of mission shall be issued by the Head of State, by the Head of Government, by the Minister for Foreign Affairs or, if the rules of the Organization so permit, by another competent authority of the sending State and shall be transmitted to the Organization.

#### Article 11

##### *Accreditation to organs of the Organization*

1. A member State may specify in the credentials issued to its permanent representative that he is authorized to act as a delegate to one or more organs of the Organization.
2. Unless a member State provides otherwise its permanent representative may act as a delegate to organs of the Organization for which there are no special requirements as regards representation.

3. A non-member State may specify in the credentials issued to its permanent observer that he is authorized to act as an observer delegate to one or more organs of the Organization when this is permitted by the rules of the Organization or the organ concerned.

## Article 12

### *Full powers for the conclusion of a treaty with the Organization*

1. The head of mission, by virtue of his functions and without having to produce full powers, is considered as representing his State for the purpose of adopting the text of a treaty between that State and the Organization.

2. The head of mission is not considered by virtue of his functions as representing his State for the purpose of signing a treaty, or signing a treaty *ad referendum*, between that State and the Organization unless it appears from the practice of the Organization, or from other circumstances, that the intention of the parties was to dispense with full powers.

## Article 13

### *Composition of the mission*

In addition to the head of mission, the mission may include diplomatic staff, administrative and technical staff and service staff.

## Article 14

### *Size of the mission*

The size of the mission shall not exceed what is reasonable and normal, having regard to the functions of the Organization, the needs of the particular mission and the circumstances and conditions in the host State.

## Article 15

### *Notifications*

1. The sending State shall notify the Organization of:

(a) the appointment, position, title and order of precedence of the members of the mission, their arrival, their final departure or the termination of their functions with the mission, and any other changes affecting their status that may occur in the course of their service with the mission;

(b) the arrival and final departure of any person belonging to the family of a member of the mission and forming part of his household and, where appropriate, the fact that a person becomes or ceases to be such a member of the family;

(c) the arrival and final departure of persons employed on the private staff of members of the mission and the termination of their employment as such;

(d) the beginning and the termination of the employment of persons resident in the host State as members of the staff of the mission or as persons employed on the private staff;

(e) the location of the premises of the mission and of the private residences enjoying inviolability under articles 23 and 29, as well as any other information that may be necessary to identify such premises and residences.

2. Where possible, prior notification of arrival and final departure shall also be given.

3. The Organization shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.
4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

#### Article 16

##### *Acting head of mission*

If the post of head of mission is vacant, or if the head of mission is unable to perform his functions, the sending State may appoint an acting head of mission whose name shall be notified to the Organization and by it to the host State.

#### Article 17

##### *Precedence*

1. Precedence among permanent representatives shall be determined by the alphabetical order of the names of the States used in the Organization.
2. Precedence among permanent observers shall be determined by the alphabetical order of the names of the States used in the Organization.

#### Article 18

##### *Location of the mission*

Missions should be established in the locality where the Organization has its seat. However, if the rules of the Organization so permit and with the prior consent of the host State, the sending State may establish a mission or an office of a mission in a locality other than that in which the Organization has its seat.

#### Article 19

##### *Use of flag and emblem*

1. The mission shall have the right to use the flag and emblem of the sending State on its premises. The head of mission shall have the same right as regards his residence and means of transport.
2. In the exercise of the right accorded by this article regard shall be had to the laws, regulations and usages of the host State.

#### Article 20

##### *General facilities*

1. The host State shall accord to the mission all necessary facilities for the performance of its functions.
2. The Organization shall assist the mission in obtaining those facilities and shall accord to the mission such facilities as lie within its own competence.

#### Article 21

##### *Premises and accommodation*

1. The host State and the Organization shall assist the sending State in obtaining on reasonable terms premises necessary for the mission in the territory of the host State. Where necessary, the host State shall facilitate in accordance with its laws the acquisition of such premises.

2. Where necessary, the host State and the Organization shall also assist the mission in obtaining on reasonable terms suitable accommodation for its members.

#### Article 22

##### *Assistance by the Organization in respect of privileges and immunities*

1. The Organization shall, where necessary, assist the sending State, its mission and the members of its mission in securing the enjoyment of the privileges and immunities provided for under the present Convention.
2. The Organization shall, where necessary, assist the host State in securing the discharge of the obligations of the sending State, its mission and the members of its mission in respect of the privileges and immunities provided for under the present Convention.

#### Article 23

##### *Inviolability of premises*

1. The premises of the mission shall be inviolable. The agents of the host State may not enter them, except with the consent of the head of mission.
2. (a) The host State is under a special duty to take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity.  
(b) In case of an attack on the premises of the mission, the host State shall take all appropriate steps to prosecute and punish persons who have committed the attack.
3. The premises of the mission, their furnishings and other property thereon and the means of transport of the mission shall be immune from search, requisition, attachment or execution.

#### Article 24

##### *Exemption of the premises from taxation*

1. The premises of the mission of which the sending State or any person acting on its behalf is the owner or the lessee shall be exempt from all national, regional or municipal dues and taxes other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or with any person acting on its behalf.

#### Article 25

##### *Inviolability of archives and documents*

The archives and documents of the mission shall be inviolable at all times and wherever they may be.

#### Article 26

##### *Freedom of movement*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State

shall ensure freedom of movement and travel in its territory to all members of the mission and members of their families forming part of their households.

## Article 27

### *Freedom of communication*

1. The host State shall permit and protect free communication on the part of the mission for all official purposes. In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions, delegations and observer delegations, wherever situated, the mission may employ all appropriate means, including couriers and messages in code or cipher. However, the mission may install and use a wireless transmitter only with the consent of the host State.
2. The official correspondence of the mission shall be inviolable. Official correspondence means all correspondence relating to the mission and its functions.
3. The bag of the mission shall not be opened or detained.
4. The packages constituting the bag of the mission must bear visible external marks of their character and may contain only documents or articles intended for the official use of the mission.
5. The courier of the mission, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
6. The sending State or the mission may designate couriers *ad hoc* of the mission. In such cases the provisions of paragraph 5 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the mission's bag in his charge.
7. The bag of the mission may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the mission. By arrangement with the appropriate authorities of the host State, the mission may send one of its members to take possession of the bag directly and freely from the captain of the ship or the aircraft.

## Article 28

### *Personal inviolability*

The persons of the head of mission and of the members of the diplomatic staff of the mission shall be inviolable. They shall not be liable to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity and to prosecute and punish persons who have committed such attacks.

## Article 29

### *Inviolability of residence and property*

1. The private residence of the head of mission and of the members of the diplomatic staff of the mission shall enjoy the same inviolability and protection as the premises of the mission.
2. The papers, correspondence and, except as provided in paragraph 2 of article 30, the property of the head of mission or of members of the diplomatic staff of the mission shall also enjoy inviolability.

## Article 30

### *Immunity from jurisdiction*

1. The head of mission and the members of the diplomatic staff of the mission shall enjoy immunity from the criminal jurisdiction of the host State. They shall also enjoy immunity from its civil and administrative jurisdiction, except in the case of:
  - (a) a real action relating to private immovable property situated in the territory of the host State, unless the person in question holds it on behalf of the sending State for the purposes of the mission;
  - (b) an action relating to succession in which the person in question is involved as executor, administrator, heir or legatee as a private person and not on behalf of the sending State;
  - (c) an action relating to any professional or commercial activity exercised by the person in question in the host State outside his official functions.
2. No measures of execution may be taken in respect of the head of mission or a member of the diplomatic staff of the mission except in cases coming under subparagraphs (a), (b) and (c) of paragraph 1 of this article, and provided that the measures concerned can be taken without infringing the inviolability of his person or of his residence.
3. The head of mission and the members of the diplomatic staff of the mission are not obliged to give evidence as witnesses.
4. The immunity of the head of mission or of a member of the diplomatic staff of the mission from the jurisdiction of the host State does not exempt him from the jurisdiction of the sending State.

## Article 31

### *Waiver of immunity*

1. The immunity from jurisdiction of the head of mission and members of the diplomatic staff of the mission and of persons enjoying immunity under article 36 may be waived by the sending State.
2. Waiver must always be express.
3. The initiation of proceedings by any of the persons referred to in paragraph 1 of this article shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.
4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect

of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 of this article in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

## Article 32

### *Exemption from social security legislation*

1. Subject to the provisions of paragraph 3 of this article, the head of mission and the members of the diplomatic staff of the mission shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of the head of mission or of a member of the diplomatic staff of the mission, on condition:

(a) that such employed persons are not nationals of or permanently resident in the host State; and

(b) that they are covered by the social security provisions which may be in force in the sending State or a third State.

3. The head of mission and the members of the diplomatic staff of the mission who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

## Article 33

### *Exemption from dues and taxes*

The head of mission and the members of the diplomatic staff of the mission shall be exempt from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the mission;

(c) estate, succession or inheritance duties levied by the host State, subject to the provisions of paragraph 4 of article 38;

(d) dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 24.



### Article 34

#### *Exemption from personal services*

The host State shall exempt the head of mission and the members of the diplomatic staff of the mission from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

### Article 35

#### *Exemption from customs duties and inspection*

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

- (a) articles for the official use of the mission;
- (b) articles for the personal use of the head of mission or a member of the diplomatic staff of the mission, including articles intended for his establishment.

2. The personal baggage of the head of mission or a member of the diplomatic staff of the mission shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

### Article 36

#### *Privileges and immunities of other persons*

1. The members of the family of the head of mission forming part of his household and the members of the family of a member of the diplomatic staff of the mission forming part of his household shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 28, 29, 30, 32, 33, 34 and in paragraphs 1(b) and 2 of article 35.

2. Members of the administrative and technical staff of the mission, together with members of their families forming part of their respective households who are not nationals of or permanently resident in the host State, shall enjoy the privileges and immunities specified in articles 28, 29, 30, 32, 33 and 34, except that the immunity from civil and administrative jurisdiction of the host State specified in paragraph 1 of article 30 shall not extend to acts performed outside the course of their duties. They shall also enjoy the privileges specified in paragraph 1(b) of article 35 in respect of articles imported at the time of first installation.

3. Members of the service staff of the mission who are not nationals of or permanently resident in the host State shall enjoy immunity in respect of acts performed in the course of their duties, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption specified in article 32.

4. Private staff of members of the mission shall, if they are not nationals of or permanently resident in the host State, be exempt from dues and

taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

### Article 37

#### *Nationals and permanent residents of the host State*

1. Except in so far as additional privileges and immunities may be granted by the host State, the head of mission or any member of the diplomatic staff of the mission who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of his functions.
2. Other members of the staff of the mission who are nationals of or permanently resident in the host State shall enjoy only immunity from jurisdiction in respect of official acts performed in the exercise of their functions. In all other respects, those members, and persons on the private staff who are nationals of or permanently resident in the host State, shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the functions of the mission.

### Article 38

#### *Duration of privileges and immunities*

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State on proceeding to take up his post or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization or by the sending State.
2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the territory, or on the expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the mission, immunity shall continue to subsist.
3. In the event of the death of a member of the mission, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the territory.
4. In the event of the death of a member of the mission not a national of or permanently resident in the host State or of a member of his family forming part of his household, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the territory the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the mission or of the family of a member of the mission.

### Article 39

#### *Professional or commercial activity*

1. The head of mission and members of the diplomatic staff of the mission shall not practise for personal profit any professional or commercial activity in the host State.
2. Except in so far as such privileges and immunities may be granted by the host State, members of the administrative and technical staff and persons forming part of the household of a member of the mission shall not, when they practise a professional or commercial activity for personal profit, enjoy any privilege or immunity in respect of acts performed in the course of or in connexion with the practice of such activity.

### Article 40

#### *End of functions*

The functions of the head of mission or of a member of the diplomatic staff of the mission shall come to an end, *inter alia*:

- (a) on notification of their termination by the sending State to the Organization;
- (b) if the mission is finally or temporarily recalled.

### Article 41

#### *Protection of premises, property and archives*

1. When the mission is temporarily or finally recalled, the host State must respect and protect the premises, property and archives of the mission. The sending State must take all appropriate measures to terminate this special duty of the host State as soon as possible. It may entrust custody of the premises, property and archives of the mission to the Organization if it so agrees, or to a third State acceptable to the host State.
2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and archives of the mission from the territory of the host State.

## PART III

### DELEGATIONS TO ORGANS AND TO CONFERENCES

### Article 42

#### *Sending of delegations*

1. A State may send a delegation to an organ or to a conference in accordance with the rules of the Organization.
2. Two or more States may send the same delegation to an organ or to a conference in accordance with the rules of the Organization.

### Article 43

#### *Appointment of the members of the delegation*

Subject to the provisions of articles 46 and 73, the sending State may freely appoint the members of the delegation.

#### Article 44

##### *Credentials of delegates*

The credentials of the head of delegation and of other delegates shall be issued by the Head of State, by the Head of Government, by the Minister for Foreign Affairs or, if the rules of the Organization or the rules of procedure of the conference so permit, by another competent authority of the sending State. They shall be transmitted, as the case may be, to the Organization or to the conference.

#### Article 45

##### *Composition of the delegation*

In addition to the head of delegation, the delegation may include other delegates, diplomatic staff, administrative and technical staff and service staff.

#### Article 46

##### *Size of the delegation*

The size of the delegation shall not exceed what is reasonable and normal, having regard, as the case may be, to the functions of the organ or the object of the conference, as well as the needs of the particular delegation and the circumstances and conditions in the host State.

#### Article 47

##### *Notifications*

1. The sending State shall notify the Organization or, as the case may be, the conference of:

(a) the composition of the delegation, including the position, title and order of precedence of the members of the delegation, and any subsequent changes therein;

(b) the arrival and final departure of members of the delegation and the termination of their functions with the delegation;

(c) the arrival and final departure of any person accompanying a member of the delegation;

(d) the beginning and the termination of the employment of persons resident in the host State as members of the staff of the delegation or as persons employed on the private staff;

(e) the location of the premises of the delegation and of the private accommodation enjoying inviolability under article 59, as well as any other information that may be necessary to identify such premises and accommodation.

2. Where possible, prior notification of arrival and final departure shall also be given.

3. The Organization or, as the case may be, the conference shall transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

4. The sending State may also transmit to the host State the notifications referred to in paragraphs 1 and 2 of this article.

## Article 48

### *Acting head of delegation*

1. If the head of delegation is absent or unable to perform his functions, an acting head of delegation shall be designated from among the other delegates by the head of delegation or, in case he is unable to do so, by a competent authority of the sending State. The name of the acting head of delegation shall be notified, as the case may be, to the Organization or to the conference.

2. If a delegation does not have another delegate available to serve as acting head of delegation, another person may be designated for that purpose. In such case credentials must be issued and transmitted in accordance with article 44.

## Article 49

### *Precedence*

Precedence among delegations shall be determined by the alphabetical order of the names of the States used in the Organization.

## Article 50

### *Status of the Head of State and persons of high rank*

1. The Head of State or any member of a collegial body performing the functions of Head of State under the constitution of the State concerned, when he leads the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law to Heads of State.

2. The Head of Government, the Minister for Foreign Affairs or other person of high rank, when he leads or is a member of the delegation, shall enjoy in the host State or in a third State, in addition to what is granted by the present Convention, the facilities, privileges and immunities accorded by international law to such persons.

## Article 51

### *General facilities*

1. The host State shall accord to the delegation all necessary facilities for the performance of its tasks.

2. The Organization or, as the case may be, the conference shall assist the delegation in obtaining those facilities and shall accord to the delegation such facilities as lie within its own competence.

## Article 52

### *Premises and accommodation*

If so requested, the host State and, where necessary, the Organization or the conference shall assist the sending State in obtaining on reasonable terms premises necessary for the delegation and suitable accommodation for its members.

### Article 53

#### *Assistance in respect of privileges and immunities*

1. The Organization or, as the case may be, the Organization and the conference shall, where necessary, assist the sending State, its delegation and the members of its delegation in securing the enjoyment of the privileges and immunities provided for under the present Convention.
2. The Organization or, as the case may be, the Organization and the conference shall, where necessary, assist the host State in securing the discharge of the obligations of the sending State, its delegation and the members of its delegation in respect of the privileges and immunities provided for under the present Convention.

### Article 54

#### *Exemption of the premises from taxation*

1. The sending State or any member of the delegation acting on behalf of the delegation shall be exempt from all national, regional or municipal dues and taxes in respect of the premises of the delegation other than such as represent payment for specific services rendered.
2. The exemption from taxation referred to in this article shall not apply to such dues and taxes payable under the law of the host State by persons contracting with the sending State or with a member of the delegation.

### Article 55

#### *Inviolability of archives and documents*

The archives and documents of the delegation shall be inviolable at all times and wherever they may be.

### Article 56

#### *Freedom of movement*

Subject to its laws and regulations concerning zones entry into which is prohibited or regulated for reasons of national security, the host State shall ensure to all members of the delegation such freedom of movement and travel in its territory as is necessary for the performance of the tasks of the delegation.

### Article 57

#### *Freedom of communication*

1. The host State shall permit and protect free communication on the part of the delegation for all official purposes. In communicating with the Government of the sending State, its permanent diplomatic missions, consular posts, permanent missions, permanent observer missions, special missions, other delegations, and observer delegations, wherever situated, the delegation may employ all appropriate means, including couriers and messages in code or cipher. However, the delegation may install and use a wireless transmitter only with the consent of the host State.
2. The official correspondence of the delegation shall be inviolable. Official correspondence means all correspondence relating to the delegation and its tasks.

3. Where practicable, the delegation shall use the means of communication, including the bag and the courier, of the permanent diplomatic mission, of a consular post, of the permanent mission or of the permanent observer mission of the sending State.
4. The bag of the delegation shall not be opened or detained.
5. The packages constituting the bag of the delegation must bear visible external marks of their character and may contain only documents or articles intended for the official use of the delegation.
6. The courier of the delegation, who shall be provided with an official document indicating his status and the number of packages constituting the bag, shall be protected by the host State in the performance of his functions. He shall enjoy personal inviolability and shall not be liable to any form of arrest or detention.
7. The sending State or the delegation may designate couriers *ad hoc* of the delegation. In such cases the provisions of paragraph 6 of this article shall also apply, except that the immunities therein mentioned shall cease to apply when the courier *ad hoc* has delivered to the consignee the delegation's bag in his charge.
8. The bag of the delegation may be entrusted to the captain of a ship or of a commercial aircraft scheduled to land at an authorized port of entry. He shall be provided with an official document indicating the number of packages constituting the bag, but he shall not be considered to be a courier of the delegation. By arrangement with the appropriate authorities of the host State, the delegation may send one of its members to take possession of the bag directly and freely from the captain of the ship or of the aircraft.

## Article 58

### *Personal inviolability*

The persons of the head of delegation and of other delegates and members of the diplomatic staff of the delegation shall be inviolable. They shall not be liable *inter alia* to any form of arrest or detention. The host State shall treat them with due respect and shall take all appropriate steps to prevent any attack on their persons, freedom or dignity and to prosecute and punish persons who have committed such attacks.

## Article 59

### *Inviolability of private accommodation and property*

1. The private accommodation of the head of delegation and of other delegates and members of the diplomatic staff of the delegation shall enjoy inviolability and protection.
2. The papers, correspondence and, except as provided in paragraph 2 of article 60, the property of the head of delegation and of other delegates or members of the diplomatic staff of the delegation shall also enjoy inviolability.

## Article 60

### *Immunity from jurisdiction*

1. The head of delegation and other delegates and members of the diplomatic staff of the delegation shall enjoy immunity from the criminal

jurisdiction of the host State, and immunity from its civil and administrative jurisdiction in respect of all acts performed in the exercise of their official functions.

2. No measures of execution may be taken in respect of such persons unless they can be taken without infringing their rights under articles 58 and 59.

3. Such persons are not obliged to give evidence as witnesses.

4. Nothing in this article shall exempt such persons from the civil and administrative jurisdiction of the host State in relation to an action for damages arising from an accident caused by a vehicle, vessel or aircraft, used or owned by the persons in question, where those damages are not recoverable from insurance.

5. Any immunity of such persons from the jurisdiction of the host State does not exempt them from the jurisdiction of the sending State.

### Article 61

#### *Waiver of immunity*

1. The immunity from jurisdiction of the head of delegation and of other delegates and members of the diplomatic staff of the delegation and of persons enjoying immunity under article 66 may be waived by the sending State.

2. Waiver must always be express.

3. The initiation of proceedings by any of the persons referred to in paragraph 1 of this article shall preclude him from invoking immunity from jurisdiction in respect of any counter-claim directly connected with the principal claim.

4. Waiver of immunity from jurisdiction in respect of civil or administrative proceedings shall not be held to imply waiver of immunity in respect of the execution of the judgment, for which a separate waiver shall be necessary.

5. If the sending State does not waive the immunity of any of the persons mentioned in paragraph 1 of this article in respect of a civil action, it shall use its best endeavours to bring about a just settlement of the case.

### Article 62

#### *Exemption from social security legislation*

1. Subject to the provisions of paragraph 3 of this article, the head of delegation and other delegates and members of the diplomatic staff of the delegation shall with respect to services rendered for the sending State be exempt from social security provisions which may be in force in the host State.

2. The exemption provided for in paragraph 1 of this article shall also apply to persons who are in the sole private employ of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation, on condition:

(a) that such employed persons are not nationals of or permanently resident in the host State; and

(b) that they are covered by the social security provisions which may be in force in the sending State of a third State.



3. The head of delegation and other delegates and members of the diplomatic staff of the delegation who employ persons to whom the exemption provided for in paragraph 2 of this article does not apply shall observe the obligations which the social security provisions of the host State impose upon employers.

4. The exemption provided for in paragraphs 1 and 2 of this article shall not preclude voluntary participation in the social security system of the host State provided that such participation is permitted by that State.

5. The provisions of this article shall not affect bilateral or multilateral agreements concerning social security concluded previously and shall not prevent the conclusion of such agreements in the future.

### Article 63

#### *Exemption from dues and taxes*

The head of delegation and other delegates and members of the diplomatic staff of the delegation shall be exempt, to the extent practicable, from all dues and taxes, personal or real, national, regional or municipal, except:

(a) indirect taxes of a kind which are normally incorporated in the price of goods or services;

(b) dues and taxes on private immovable property situated in the territory of the host State, unless the person concerned holds it on behalf of the sending State for the purposes of the delegation;

(c) estate, succession or inheritance duties levied by the host State subject to the provisions of paragraph 4 of article 68;

(d) dues and taxes on private income having its source in the host State and capital taxes on investments made in commercial undertakings in the host State;

(e) charges levied for specific services rendered;

(f) registration, court or record fees, mortgage dues and stamp duty, with respect to immovable property, subject to the provisions of article 54.

### Article 64

#### *Exemption from personal services*

The host State shall exempt the head of delegation and other delegates and members of the diplomatic staff of the delegation from all personal services, from all public service of any kind whatsoever, and from military obligations such as those connected with requisitioning, military contributions and billeting.

### Article 65

#### *Exemption from customs duties and inspection*

1. The host State shall, in accordance with such laws and regulations as it may adopt, permit entry of and grant exemption from all customs duties, taxes and related charges other than charges for storage, cartage and similar services, on:

(a) articles for the official use of the delegation;

(b) articles for the personal use of the head of delegation or any other delegate or member of the diplomatic staff of the delegation, imported in his personal baggage at the time of his first entry into the territory of the host State to attend the meeting of the organ or conference.

2. The personal baggage of the head of delegation or any other delegate or member of the diplomatic staff of the delegation shall be exempt from inspection, unless there are serious grounds for presuming that it contains articles not covered by the exemptions mentioned in paragraph 1 of this article, or articles the import or export of which is prohibited by the law or controlled by the quarantine regulations of the host State. In such cases, inspection shall be conducted only in the presence of the person enjoying the exemption or of his authorized representative.

#### Article 66

##### *Privileges and immunities of other persons*

1. The members of the family of the head of delegation who accompany him and the members of the family of any other delegate or member of the diplomatic staff of the delegation who accompany him shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 58, 60 and 64 and in paragraphs 1(b) and 2 of article 65 and exemption from alien's registration obligations.

2. Members of the administrative and technical staff of the delegation shall, if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 58, 59, 60, 62, 63 and 64. They shall also enjoy the privileges specified in paragraph 1(b) of article 65 in respect of articles imported in their personal baggage at the time of their first entry into the territory of the host State for the purpose of attending the meeting of the organ or conference. Members of the family of a member of the administrative and technical staff who accompany him shall if they are not nationals of or permanently resident in the host State, enjoy the privileges and immunities specified in articles 58, 60 and 64 and in paragraph 1(b) of article 65 to the extent accorded to such a member of the staff.

3. Members of the service staff of the delegation who are not nationals of or permanently resident in the host State shall enjoy the same immunity in respect of acts performed in the course of their duties as is accorded to members of the administrative and technical staff of the delegation, exemption from dues and taxes on the emoluments they receive by reason of their employment and the exemption specified in article 62.

4. Private staff of members of the delegation shall, if they are not nationals of or permanently resident in the host State, be exempt from dues and taxes on the emoluments they receive by reason of their employment. In other respects, they may enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those persons in such a manner as not to interfere unduly with the performance of the tasks of the delegation.

#### Article 67

##### *Nationals and permanent residents of the host State*

1. Except in so far as additional privileges and immunities may be granted by the host State the head of delegation or any other delegate or member of the diplomatic staff of the delegation who is a national of or permanently resident in that State shall enjoy only immunity from jurisdiction and inviolability in respect of official acts performed in the exercise of his functions.

2. Other members of the staff of the delegation and persons on the private staff who are nationals of or permanently resident in the host State shall enjoy privileges and immunities only to the extent admitted by the host State. However, the host State must exercise its jurisdiction over those members and persons in such a manner as not to interfere unduly with the performance of the tasks of the delegation.

## Article 68

### *Duration of privileges and immunities*

1. Every person entitled to privileges and immunities shall enjoy them from the moment he enters the territory of the host State for the purpose of attending the meeting of an organ or conference or, if already in its territory, from the moment when his appointment is notified to the host State by the Organization, by the conference or by the sending State.

2. When the functions of a person enjoying privileges and immunities have come to an end, such privileges and immunities shall normally cease at the moment when he leaves the territory, or on the expiry of a reasonable period in which to do so. However, with respect to acts performed by such a person in the exercise of his functions as a member of the delegation, immunity shall continue to subsist.

3. In the event of the death of a member of the delegation, the members of his family shall continue to enjoy the privileges and immunities to which they are entitled until the expiry of a reasonable period in which to leave the territory.

4. In the event of the death of a member of the delegation not a national of or permanently resident in the host State or of a member of his family accompanying him, the host State shall permit the withdrawal of the movable property of the deceased, with the exception of any property acquired in the territory the export of which was prohibited at the time of his death. Estate, succession and inheritance duties shall not be levied on movable property which is in the host State solely because of the presence there of the deceased as a member of the delegation or of the family of a member of the delegation.

## Article 69

### *End of functions*

The functions of the head of delegation or of any other delegate or member of the diplomatic staff of the delegation shall come to an end, *inter alia*:

- (a) on notification of their termination by the sending State to the Organization or the conference;
- (b) upon the conclusion of the meeting of the organ or the conference.

## Article 70

### *Protection of premises, property and archives*

1. When the meeting of an organ or a conference comes to an end, the host State must respect and protect the premises of the delegation so long as they are used by it, as well as the property and archives of the delegation. The sending State must take all appropriate measures to terminate this special duty of the host State as soon as possible.

2. The host State, if requested by the sending State, shall grant the latter facilities for removing the property and the archives of the delegation from the territory of the host State.

#### PART IV

##### OBSERVER DELEGATIONS TO ORGANS AND TO CONFERENCES

#### Article 71

##### *Sending of observer delegations*

A State may send an observer delegation to an organ or to a conference in accordance with the rules of the Organization.

#### Article 72

##### *General provision concerning observer delegations*

All the provisions of articles 43 to 70 of the present Convention shall apply to observer delegations.

#### PART V

##### GENERAL PROVISIONS

#### Article 73

##### *Nationality of the members of the mission, the delegation or the observer delegation*

1. The head of mission and members of the diplomatic staff of the mission, the head of delegation, other delegates and members of the diplomatic staff of the delegation, the head of the observer delegation, other observer delegates and members of the diplomatic staff of the observer delegation should in principle be of the nationality of the sending State.
2. The head of mission and members of the diplomatic staff of the mission may not be appointed from among persons having the nationality of the host State except with the consent of that State, which may be withdrawn at any time.
3. Where the head of delegation, any other delegate or any member of the diplomatic staff of the delegation or the head of the observer delegation, any other observer delegate or any member of the diplomatic staff of the observer delegation is appointed from among persons having the nationality of the host State, the consent of that State shall be assumed if it has been notified of such appointment of a national of the host State and has made no objection.

#### Article 74

##### *Laws concerning acquisition of nationality*

Members of the mission, the delegation or the observer delegation not being nationals of the host State, and members of their families forming part of their household or, as the case may be, accompanying them, shall not, solely by the operation of the law of the host State, acquire the nationality of that State.

## Article 75

### *Privileges and immunities in case of multiple functions*

When members of the permanent diplomatic mission or of a consular post in the host State are included in a mission, a delegation or an observer delegation, they shall retain their privileges and immunities as members of their permanent diplomatic mission or consular post in addition to the privileges and immunities accorded by the present Convention.

## Article 76

### *Co-operation between sending States and host States*

Whenever necessary and to the extent compatible with the independent exercise of the functions of the mission, the delegation or the observer delegation, the sending State shall co-operate as fully as possible with the host State in the conduct of any investigation or prosecution carried out pursuant to the provisions of articles 23, 28, 29 and 58.

## Article 77

### *Respect for the laws and regulations of the host State*

1. Without prejudice to their privileges and immunities, it is the duty of all persons enjoying such privileges and immunities to respect the laws and regulations of the host State. They also have a duty not to interfere in the internal affairs of that State.
2. In case of grave and manifest violation of the criminal law of the host State by a person enjoying immunity from jurisdiction, the sending State shall, unless it waives the immunity of the person concerned, recall him, terminate his functions with the mission, the delegation or the observer delegation or secure his departure, as appropriate. The sending State shall take the same action in case of grave and manifest interference in the internal affairs of the host State. The provisions of this paragraph shall not apply in the case of any act that the person concerned performed in carrying out the functions of the mission or the tasks of the delegation or of the observer delegation.
3. The premises of the mission and the premises of the delegation shall not be used in any manner incompatible with the exercise of the functions of the mission or the performance of the tasks of the delegation.
4. Nothing in this article shall be construed as prohibiting the host State from taking such measures as are necessary for its own protection. In that event the host State shall, without prejudice to articles 84 and 85, consult the sending State in an appropriate manner in order to ensure that such measures do not interfere with the normal functioning of the mission, the delegation or the observer delegation.
5. The measures provided for in paragraph 4 of this article shall be taken with the approval of the Minister for Foreign Affairs or of any other competent minister in conformity with the constitutional rules of the host State.

## Article 78

### *Insurance against third party risks*

The members of the mission, of the delegation or of the observer delegation shall comply with all obligations under the laws and regulations of

the host State relating to third-party liability insurance for any vehicle, vessel or aircraft used or owned by them.

#### Article 79

##### *Entry into the territory of the host State*

1. The host State shall permit entry into its territory of:
  - (a) members of the mission and members of their families forming part of their respective households, and
  - (b) members of the delegation and members of their families accompanying them, and
  - (c) members of the observer delegation and members of their families accompanying them.
2. Visas, when required, shall be granted as promptly as possible to any person referred to in paragraph 1 of this article.

#### Article 80

##### *Facilities for departure*

The host State shall, if requested, grant facilities to enable persons enjoying privileges and immunities, other than nationals of the host State, and members of the families of such persons irrespective of their nationality, to leave its territory.

#### Article 81

##### *Transit through the territory of a third State*

1. If a head of mission or a member of the diplomatic staff of the mission, a head of delegation, other delegate or member of the diplomatic staff of the delegation, a head of an observer delegation, other observer delegate or member of the diplomatic staff of the observer delegation passes through or is in the territory of a third State which has granted him a passport visa if such visa was necessary, while proceeding to take up or to resume his functions, or when returning to his own country, the third State shall accord him inviolability and such other immunities as may be required to ensure his transit.
2. The provisions of paragraph 1 of this article shall also apply in the case of:
  - (a) members of the family of the head of mission or of a member of the diplomatic staff of the mission forming part of his household and enjoying privileges and immunities, whether travelling with him or travelling separately to join him or to return to their country;
  - (b) members of the family of the head of delegation, of any other delegate or member of the diplomatic staff of the delegation who are accompanying him and enjoy privileges and immunities, whether travelling with him or travelling separately to join him or to return to their country;
  - (c) members of the family of the head of the observer delegation, of any other observer delegate or member of the diplomatic staff of the observer delegation, who are accompanying him and enjoy privileges and immunities, whether travelling with him or travelling separately to join him or to return to their country.
3. In circumstances similar to those specified in paragraphs 1 and 2 of this article, third States shall not hinder the passage of members of the

administrative and technical or service staff, and of members of their families, through their territories.

4. Third States shall accord to official correspondence and other official communications in transit, including messages in code or cipher, the same freedom and protection as the host State is bound to accord under the present Convention. They shall accord to the couriers of the mission, of the delegation or of the observer delegation, who have been granted a passport visa if such visa was necessary, and to the bags of the mission, of the delegation or of the observer delegation in transit the same inviolability and protection as the host State is bound to accord under the present Convention.

5. The obligations of third States under paragraphs 1, 2, 3 and 4 of this article shall also apply to the persons mentioned respectively in those paragraphs, and to the official communications and bags of the mission, of the delegation or of the observer delegation when they are present in the territory of the third State owing to *force majeure*.

#### Article 82

##### *Non-recognition of States or governments or absence of diplomatic or consular relations*

1. The rights and obligations of the host State and of the sending State under the present Convention shall be affected neither by the non-recognition by one of those States of the other State or of its government nor by the non-existence or the severance of diplomatic or consular relations between them.

2. The establishment or maintenance of a mission, the sending or attendance of a delegation or of an observer delegation or any act in application of the present Convention shall not by itself imply recognition by the sending State of the host State or its government or by the host State of the sending State or its government.

#### Article 83

##### *Non-discrimination*

In the application of the provisions of the present Convention no discrimination shall be made as between States.

#### Article 84

##### *Consultations*

If a dispute between two or more States Parties arises out of the application or interpretation of the present Convention, consultations between them shall be held upon the request of any of them. At the request of any of the parties to the dispute, the Organization or the conference shall be invited to join in the consultations.

#### Article 85

##### *Conciliation*

1. If the dispute is not disposed of as a result of the consultations referred to in article 84 within one month from the date of their inception, any State participating in the consultations may bring the dispute before

a conciliation commission constituted in accordance with the provisions of this article by giving written notice to the Organization and to the other States participating in the consultations.

2. Each conciliation commission shall be composed of three members: two members who shall be appointed respectively by each of the parties to the dispute, and a Chairman appointed in accordance with paragraph 3 of this article. Each State Party to the present Convention shall designate in advance a person to serve as a member of such a commission. It shall notify the designation to the Organization, which shall maintain a register of persons so designated. If it does not make the designation in advance, it may do so during the conciliation procedure up to the moment at which the Commission begins to draft the report which it is to prepare in accordance with paragraph 7 of this article.

3. The Chairman of the Commission shall be chosen by the other two members. If the other two members are unable to agree within one month from the notice referred to in paragraph 1 of this article or if one of the parties to the dispute has not availed itself of its right to designate a member of the Commission, the Chairman shall be designated at the request of one of the parties to the dispute by the chief administrative officer of the Organization. The appointment shall be made within a period of one month from such request. The chief administrative officer of the Organization shall appoint as the Chairman a qualified jurist who is neither an official of the Organization nor a national of any State party to the dispute.

4. Any vacancy shall be filled in the manner prescribed for the initial appointment.

5. The Commission shall function as soon as the Chairman has been appointed even if its composition is incomplete.

6. The Commission shall establish its own rules of procedure and shall reach its decisions and recommendations by a majority vote. It may recommend to the Organization, if the Organization is so authorized in accordance with the Charter of the United Nations, to request an advisory opinion from the International Court of Justice regarding the application or interpretation of the present Convention.

7. If the Commission is unable to obtain an agreement among the parties to the dispute on a settlement of the dispute within two months from the appointment of its Chairman, it shall prepare as soon as possible a report of its proceedings and transmit it to the parties to the dispute. The report shall include the Commission's conclusions upon the facts and questions of law and the recommendations which it has submitted to the parties to the dispute in order to facilitate a settlement of the dispute. The two months time limit may be extended by decision of the Commission. The recommendations in the report of the Commission shall not be binding on the parties to the dispute unless all the parties to the dispute have accepted them. Nevertheless, any party to the dispute may declare unilaterally that it will abide by the recommendations in the report so far as it is concerned.

8. Nothing in the preceding paragraphs of this article shall preclude the establishment of any other appropriate procedure for the settlement of disputes arising out of the application or interpretation of the present Convention or the conclusion of any agreement between the parties to the dispute to submit the dispute to a procedure instituted in the Organization or to any other procedure.



9. This article is without prejudice to provisions concerning the settlement of disputes contained in international agreements in force between States or between States and international organizations.

#### PART VI

#### FINAL CLAUSES

#### Article 86

##### *Signature*

The present Convention shall be open for signature by all States until 30 September 1975 at the Federal Ministry for Foreign Affairs of the Republic of Austria and subsequently, until 30 March 1976, at United Nations Headquarters in New York.

#### Article 87

##### *Ratification*

The present Convention is subject to ratification. The instruments of ratification shall be deposited with the Secretary-General of the United Nations.

#### Article 88

##### *Accession*

The present Convention shall remain open for accession by any State. The instruments of accession shall be deposited with the Secretary-General of the United Nations.

#### Article 89

##### *Entry into force*

1. The present Convention shall enter into force on the thirtieth day following the date of deposit of the thirty-fifth instrument of ratification or accession.
2. For each State ratifying or acceding to the Convention after the deposit of the thirty-fifth instrument of ratification or accession, the Convention shall enter into force on the thirtieth day after the deposit by such State of its instrument of ratification or accession.

#### Article 90

##### *Implementation by organizations*

After the entry into force of the present Convention, the competent organ of an international organization of a universal character may adopt a decision to implement the relevant provisions of the Convention. The Organization shall communicate the decision to the host State and to the depositary of the Convention.

#### Article 91

##### *Notifications by the depositary*

1. As depositary of the present Convention, the Secretary-General of the United Nations shall inform all States:

- (a) of signatures to the Convention and of the deposit of instruments of ratification or accession, in accordance with articles 86, 87 and 88;
- (b) of the date on which the Convention will enter into force, in accordance with article 89;
- (c) of any decision communicated in accordance with article 90.

2. The Secretary-General of the United Nations shall also inform all States, as necessary, of other acts, notifications or communications relating to the present Convention.

## Article 92

### *Authentic texts*

The original of the present Convention, of which the Chinese, English, French, Russian and Spanish texts are equally authentic, shall be deposited with the Secretary-General of the United Nations, who shall send certified copies thereof to all States.

\* \* \*

### RESOLUTION RELATING TO THE OBSERVER STATUS OF NATIONAL LIBERATION MOVEMENTS RECOGNIZED BY THE ORGANIZATION OF AFRICAN UNITY AND/OR BY THE LEAGUE OF ARAB STATES

*The United Nations Conference on the Representation of States in Their Relations with International Organizations,*

*Recalling* that, by its resolution 3072 (XXVIII) of 30 November 1973, the General Assembly referred to the Conference the draft articles on the representation of States in their relations with international organizations adopted by the International Law Commission at its twenty-third session,

*Noting* that the draft articles adopted by the Commission deal only with the representation of States in their relations with international organizations,

*Recalling further* that, by its resolution 3247 (XXIX) of 29 November 1974, the General Assembly decided to invite the national liberation movements recognized by the Organization of African Unity and/or by the League of Arab States in their respective regions to participate in the Conference as observers, in accordance with the practice of the United Nations,

*Noting* the current practice of inviting the above-mentioned national liberation movements to participate as observers in the sessions and work of the General Assembly of the United Nations, in conferences held under the auspices of the General Assembly or under the auspices of other United Nations organs, and in meetings of the specialized agencies and other organizations of the United Nations family,

*Convinced* that the participation of the above-mentioned national liberation movements in the work of international organizations helps to strengthen international peace and co-operation,

*Desirous* of ensuring the effective participation of the above-mentioned movements as observers in the work of international organizations and of regulating, to that end, their status and the facilities, privileges and immunities necessary for the performance of their tasks,

1. *Requests* the General Assembly of the United Nations at its thirtieth regular session to examine this question without delay;

2. *Recommends*, in the meantime, the States concerned to accord to delegations of national liberation movements which are recognized by the

Organization of African Unity and/or by the League of Arab States in their respective regions and which have been granted observer status by the international organization concerned, the facilities, privileges and immunities necessary for the performance of their tasks and to be guided therein by the pertinent provisions of the Convention adopted by this Conference;

3. *Decides* to include the present resolution in the Final Act of the Conference.

\* \* \*

RESOLUTION RELATING TO THE APPLICATION OF THE CONVENTION  
IN FUTURE ACTIVITIES OF INTERNATIONAL ORGANIZATIONS

*The United Nations Conference on the Representation of States in Their Relations with International Organizations,*

*Considering* that the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character will help to improve relations between States within the framework of international organizations and at conferences convened by, or under the auspices of, such organizations,

*Bearing in mind* that the above-mentioned Convention will help to prevent disputes between sending States and host States,

*Recommends* to the General Assembly of the United Nations that a suitable request should be made to the Secretary-General to inform Member States whether States that have asked to be hosts of future international organizations of a universal character or of conferences convened by, or under the auspices of, international organizations of a universal character have duly ratified or have acceded to the Vienna Convention on the Representation of States in Their Relations with International Organizations of a Universal Character.

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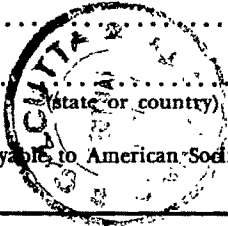
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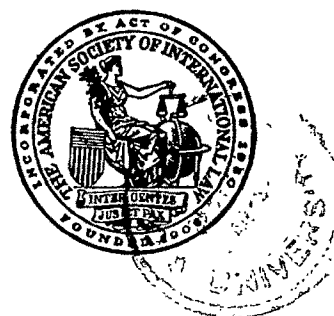
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THE THIRD UNITED NATIONS CONFERENCE  
ON THE LAW OF THE SEA:  
THE 1975 GENEVA SESSION \*

*By John R. Stevenson \*\* and  
Bernard H. Oxman \*\*\**

The second substantive session of the Third United Nations Conference on the Law of the Sea was held at Geneva from March 26 to May 10, 1975. It was decided at the outset that this would be a negotiating session. There was no general debate. Few formal meetings were held. Even informal working groups of the whole tended to rely on smaller groups the work of which was necessarily removed from public view. Progress, in many respects substantial progress, was made toward producing generally acceptable texts in this way. However, the Conference did not complete the negotiation of a new Law of the Sea Convention or approved texts.

The Conference has recommended to the United Nations General Assembly that another session be held in early 1976, and that this session be authorized to convene a further session in 1976 if necessary.<sup>1</sup> It also requested that arrangements be made to afford interpretation and other logistical support to informal intersessional work, plans for which were already well underway at the end of the Geneva session.

The principal procedural result of the Geneva session was the preparation of informal single texts covering all substantive subjects before the Conference.<sup>2</sup> Pursuant to the recommendation of the Conference President, endorsed by the Conference by consensus, the single texts were prepared by the Chairmen of the three Main Committees. They are intended to serve as a basis for negotiation of a comprehensive treaty and do not represent agreed articles or consensus texts; they represent the judgment of

\* This article is a sequel to Stevenson & Oxman, *The Preparations for the Law of the Sea Conference*, 68 AJIL 1 (1974), and *The Third United Nations Conference on the Law of the Sea: the 1974 Caracas Session*, 69 AJIL 1 (1975). The views expressed herein are those of the authors and do not necessarily represent the views of the Department of State or the U.S. Government.

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\*\*\* Assistant Legal Adviser for Oceans, Environment and Scientific Affairs, U.S. Department of State; U.S. Representative in Committee II, Geneva Session of Law of the Sea Conference.

<sup>1</sup> Letter of May 19, 1975 from the President of the Conference to the President of the General Assembly, UN Doc. A/10121, June 18, 1975.

<sup>2</sup> Informal Single Negotiating Text, A/CONF.62/WP.8, May 7, 1975 (hereinafter SNT); reprinted at 14 ILM 682 (1975). Its three PARTS contain the submissions of the Chairmen of the three Main Committees; these in turn are also divided into parts. The three main PARTS are referred to herein in upper case.

Committee Chairmen, based on their assessment of the negotiations thus far, as to the appropriate starting point for further negotiations during the intersessional period and at the next session. The Co-Chairmen of the Informal Working Group on Settlement of Disputes also submitted a text to the President of the Conference. The President prepared and circulated a single negotiating text on dispute settlement some months later.<sup>3</sup>

Since the single negotiating texts of the Main Committee Chairman were distributed on the last day of the session, they were not the subject of debate or negotiation as such. However, in some important respects they do reflect a basis for agreement that emerged in informal negotiations. This is particularly true of the Committee II text, which took account of the texts on the economic zone that emerged from the daily meetings of the Informal Group of Juridical Experts from some 40 nations from all regions (chaired by Minister Jens Evensen of Norway and known as the "Evensen Group") and complementary work of the Group of 77 (now composed of over 100 developing countries); texts worked out by informal groups set up by the Chairman of Committee II on a wealth of detailed provisions regarding the territorial sea and the high seas; a text on straits prepared by an informal group of moderate nations from all regions chaired by Fiji and the United Kingdom; and other negotiations.

A detailed analysis of the single negotiating texts is beyond the scope of this article. However, an examination of these texts can provide a useful basis for explaining the work done at Geneva and for discussing some of the problems the Conference faces. Moreover, it would not be surprising to find many of the provisions of these texts in the eventual treaty.

The basic structure of the law of the sea which the texts reveal reflects a possible basis for widespread agreement that has been emerging over several years. The ten main elements of that possible agreement are:

(1) a maximum 12-mile limit for the territorial sea, over which the coastal state will have sovereignty, subject to a right of innocent passage, with some elaboration of the rules of innocent passage;

(2) unimpeded passage of straits used for international navigation for all vessels and aircraft;

(3) a 200-mile economic zone in which the coastal state exercises sovereign rights over the exploration, exploitation, conservation, and management of living and nonliving resources and in which all states continue to enjoy freedoms, in particular of navigation and overflight and other uses related to navigation and communication; coastal state sovereign rights over the exploration and exploitation of the resources of the seabed and subsoil of the continental margin where it extends beyond 200 miles, coupled with a duty to contribute some international payments in respect of mineral production in the area of the margin beyond 200 miles;

(4) comprehensive coastal state control of all drilling and of all economic installations in the economic zone;

<sup>3</sup> SD.Gp/2nd Session/No.1/Rev.5, May 1, 1975; reprinted at 14 ILM 762 (1975). Informal Single Negotiating Text (Settlement of Disputes). A/CONF.62/WP.9, July 21, 1975.

(5) some adjustment and modernization of the regime of the high seas, for example the recognition of the special interest and responsibility of the state of origin for anadromous species of fish and new rules with respect to control of unauthorized broadcasting and cooperation in the suppression of illicit traffic in narcotics;

(6) an elaboration of a concept of island nations as archipelagic states which includes a precise definition of a new category of archipelagic waters and a regime of unimpeded passage through archipelagic sealanes and air routes that traverse the archipelago;

(7) international standards to prevent and control marine pollution, and limited coastal state enforcement rights with respect to vessel-source pollution;

(8) specified coastal state and flag state rights and duties with respect to scientific research in the economic zone and on the continental shelf, and general provisions regarding international cooperation in marine scientific research and transfer of marine technology;

(9) an international regime and machinery to deal with the exploration and exploitation of seabed resources beyond the limits of national jurisdiction (that is, beyond the economic zone or continental margin);

(10) a system for peaceful third-party settlement of disputes regarding the interpretation or application of the Convention which have not been resolved by negotiation or other agreed procedures.

The work of the First Committee embraces point 9. The work of the Second Committee embraces points 1 through 6. The work of the Third Committee embraces points 7 and 8. Point 10 is of course related to the work of all three Main Committees. An informal open ended group on peaceful settlement of disputes met several times each week.

For the past few years, many delegations have made it clear that their willingness to accept one or more of these elements is dependent upon the acceptance of other elements. There are almost as many major linkages in this regard as there are major issues. Accordingly, while it is convenient to examine the negotiation in terms of the work of different committees and groups, one must bear in mind the substantive and political relationships between different issues. There was no evidence in Geneva of general movement away from the concept of a single comprehensive treaty—the so-called “package deal.” There was, however, encouraging evidence of a general willingness to avoid unnecessarily complicating the negotiations with issues not central to the global accommodation being sought.

#### THE FIRST COMMITTEE

Basically, the resources in question in the international area (the “Area”) at this time are the manganese nodules lying at or near the surface of the deep seabed, mostly at depths of 12,000 feet or more.

The fundamental problem addressed in Committee I was that of reconciling the views of those favoring a system of direct exploitation by the new

international Authority to be established with the views of those interested in assuring guaranteed access to, and production of deep seabed minerals by states and their nationals under reasonable conditions with security of tenure. The progress made in exploring ways to bridge this gap revolved around attempts to elaborate "basic conditions" of a system of exploitation. It was, of course, also recognized that there are other critical elements of any accommodation, in particular the decisionmaking process of the Authority.

The Geneva session commenced in a conciliatory mood. The Group of 77 took the view that it had made an important concession at Caracas in agreeing to include basic conditions of exploitation in the treaty. Moreover, its leadership indicated that there might be some new flexibility on decisionmaking and other issues related to the structure and procedures of the international Authority (usually referred to as international "machinery" issues). Others also came to Geneva prepared to be more flexible on issues of direct concern to the developing countries. The United States Delegation expressed its willingness to consider basic conditions in the treaty as opposed to detailed regulatory provisions (on the condition that detailed regulations for the provisional period would be adopted by the Conference) and to consider a system of joint ventures, with the possibility of profit sharing, as the single method of exploitation.

The Committee devoted the first half of the session to consideration in its Working Group of basic conditions of exploitation. The Group agreed to discuss basic conditions applicable to joint ventures, recognizing that the Group of 77 reserved its position on whether the Authority would directly exploit. A consensus emerged that the legal problems involved in establishing equity joint ventures might be very difficult. Accordingly, the Chairman of the Working Group undertook to prepare a draft set of basic conditions that would be applicable to a contractual rather than an equity joint venture system.

The effort to find a set of basic conditions that would at the same time accommodate the desires for direct and effective control and for guaranteed access was arduous. New means seemed necessary for resolving the dilemma. Accordingly, in the Working Group, the United States explored a system for the reservation of areas: under this "banking system," an applicant for a joint venture would submit two mine sites of equal size, one of which the Authority would designate as a reserved area. With respect to the reserved areas, the Authority could negotiate with any state or its nationals for the most favorable financial terms and commitments to transfer technology. With respect to the other area, arrangements between the Authority and the applicant would be made in accordance with specified provisions in the treaty and basic conditions.

At the same time that the Group of 77 was considering the idea of a banking system, the U.S.S.R. introduced a draft of basic conditions that would be applicable to a parallel system in which the Authority would directly exploit a portion of the seabed by itself or under contract with

private entities, while another portion of the area would be reserved exclusively for state access.<sup>4</sup>

At midsession the Chairman of the Working Group introduced a personal draft of basic conditions that focused primarily on a contractual joint venture system, including reservation of areas for exploitation by states and for direct exploitation by the Authority. This parallel system was intensively considered by the Group of 77, which eventually rejected the concept of designating areas solely for state exploitation and also rejected the parallel system as elaborated in the draft.

With little time left, the Chairman deleted these aspects of his draft of basic conditions from the text which he submitted to the Chairman of the First Committee, and which appears as Annex I of the single negotiating text. The deadline for the text came at precisely the wrong time to permit any further reconciliation of positions.

A similar problem existed with respect to the rest of the First Committee single negotiating text. At the request of the Committee Chairman, the Working Group Chairman prepared a first draft which largely reflected developing country positions. He then began intensive private consultations which showed every promise of producing a possible basis for agreement. By the time the Working Group Chairman had a sufficient basis to prepare and to submit a revised text, the deadline had been passed. Accordingly, while widely distributed among Conference participants, the revised text of the Working Group Chairman (the "Pinto text"), which reflected his conclusions from intensive consultations, is not presented in the single negotiating text.

The first part of the Committee I single negotiating text, which contains nineteen articles dealing with the legal regime for the deep seabed, embodies treaty articles on which both the UN Seabed Committee and the Caracas session of the Conference concentrated and reflects greater progress toward a consensus than the remaining articles on the Authority and the annexes on the system of exploitation.

The single negotiating text does indicate certain steps taken in the negotiation toward an eventual accommodation on the machinery issues dealt with in the second part of the text. While these largely continue to reflect the views of the Group of 77 on the nature of the accommodation, the means for achieving that accommodation can be discerned in the text. Three points are critical.

First, a comparison of Article 26 and Article 28 indicates that a Council of limited size, rather than a plenary Assembly, will make many of the important decisions regarding supervision of resource activities. Negotiations are likely to focus on the degree to which the Assembly or the Contracting Parties can override or lay down guidelines controlling such decisions.

Secondly, Article 27 provides for the inclusion within the 36-member Council of six members with substantial investment, or possessing advanced

<sup>4</sup> A/CONF.62/C.1/L.12, March 21, 1975.

technology being used, in exploration and exploitation of the Area, or which are major importers of landbased minerals also produced from the Area; it also requires that decisions on important questions be taken by a majority of two-thirds plus one. This reflects a willingness to depart in principle from selection solely on the basis of equitable geographic representation. As a practical matter, however, the limitation to six in a Council of 36 and the discretion of the Assembly to elect states meeting the criteria without regard to their relative rank are likely to render the article unsatisfactory from the standpoint of those countries with the greatest potential investment and the most advanced technology. Negotiations are likely to focus on the required voting majority (in the Pinto text, three-quarters) and on the number and basis of selection of the developed countries on the Council (the Pinto text requires nine, comprising the most industrialized countries with substantial investment in or substantial technology with respect to the Area and its development).

Thirdly, Article 32 establishes a special tribunal with comprehensive jurisdiction over disputes not only between states parties, but between a state or a private contractor and the Authority. Article 58 makes clear that this includes review of actions by the Authority and its organs. Negotiations are likely to focus on (i) the relationship of this review to the distribution of powers in the Authority and to the general dispute settlement articles of the Law of the Sea Convention and (ii) the permissibility of contractual arrangements that seek to circumvent review by the tribunal.

It would appear that negotiations on these and related articles will continue to involve the demand, reflected in Article 26, that the Assembly be the "supreme policy-making organ of the Authority." Article 28 provides that the Council "shall act in a manner consistent with general guidelines and policy directions laid down by the Assembly." Any protection of industrial country interests built into the Council will be essentially nugatory if Council decisions may be reversed or circumscribed by an Assembly operating on a one-nation one-vote principle.

Article 28 does not provide for review of Council rules, regulations, and procedures by Contracting Parties before they enter into force; yet a direct role for Contracting Parties may be one of the best ways to achieve an accommodation of the objective of broad review and concerns about the role of the Assembly.

The views of landbased producers of minerals found in manganese nodules continue to dominate the philosophy of the text; this is manifested in particular by the absence of any express requirement that exploitation that satisfies the necessary treaty conditions should be permitted (aside from the requirement that the Authority enter into joint ventures in respect of the first "ten economically viable mining sites").<sup>5</sup> However, consumer interests have in fact made themselves felt increasingly among both developed and developing countries. Thus, while Article 30 would establish an Economic Planning Commission that could make recommendations

<sup>5</sup> SNT, PART I, Art. 22.

to the Council to protect landbased producers, the criterion of protecting only "developing countries whose economies substantially depend on the revenues derived from the export of minerals" also derived from the Area and the admonition to bear in mind "the interests of both consuming and land-based mineral producing countries" reflect a continuing and growing recognition that countries with weak but developing economies may be hurt if supplies are kept artificially low and prices artificially high.

The article of the Committee I text most critical to progress in the negotiations is Article 22, which provides that exploitation shall be conducted directly by the Authority, which "may, if it considers it appropriate," enter into arrangements with states or private parties for this purpose. Unless there is a substantial qualification of this article to provide for assured access and production by states and their nationals, an underlying accommodation will not have been achieved.

There is good reason to believe that the will to find such a breakthrough is present; it is widespread although perhaps not articulated with sufficient vigor in the Group of 77. Perhaps the best example of this positive will is reflected by the restraint shown on the issue of voting a new moratorium on deep seabed exploitation. The UN General Assembly resolution<sup>6</sup> on this matter was passed over the negative votes of the United States and other industrialized countries. Despite strong efforts by some in the Group of 77 to produce a new moratorium resolution, it was in fact recognized that raising this divisive issue could have adverse consequences for the negotiations. Instead, the President of the Conference, on the last day of the Geneva session, made a statement on the issue in which he said, *inter alia*:

I should like to make a fervent appeal to all States to refrain from taking any action, and also to use their powers to restrain their nationals from taking any action or adopting any measures, which would place in jeopardy the conclusion of a universally acceptable treaty of a just and equitable nature.

#### THE SECOND COMMITTEE

By far the largest and most diverse number of issues and the disposition of the most vital and valuable resources of the oceans at this time were entrusted to the Second Committee. It entered the Geneva session with a paper developed at Caracas to reflect the "main trends" of the discussion and which set out a clear and limited number of alternatives on virtually every issue.<sup>7</sup> That paper made orderly negotiation possible. Eight weeks later, the Chairman of Committee II produced a single text that, to a varying yet significant degree, does reflect actual negotiating progress made under the auspices of the Committee officers and in informal but representative groups. Those who cited the sheer number of

<sup>6</sup> GA Res. 2574D (XXIV); GAOR, 24th Sess., SUPP. 30, at 11, UN Doc. A/7630 (1969).

<sup>7</sup> A/CONF.62/C.2/WP.1.

issues involved as the basis for predicting an interminable and unmanageable negotiation have not yet been proven wrong. But with the Committee II single negotiating text as the point of departure, there is every reason to believe that with restraint, careful intersessional negotiation, and procedures designed to encourage the widest possible agreement, a successful result in this Committee is within reach.

The basic structure of a 12-mile maximum territorial sea, unimpeded passage of straits, and a 200-mile economic zone with sovereign rights over living and nonliving resources and special treatment for anadromous species (salmon) has now been elaborated by specific texts negotiated in various groups which were used as a basis for the single negotiating text, with work continuing on an article on highly migratory species (tuna). Those texts have not been agreed to by the Conference as a whole but do reflect negotiations among informed and articulate proponents of the main trends at the Conference and as such may provide a basis for general agreement.

The atmosphere in the Second Committee and related negotiations was extremely workmanlike. During the review of the Main Trends Paper,<sup>8</sup> there was little repetition of positions already known. The major exception concerned persistent efforts by a handful of strait states to reopen that paper; the overwhelming view was that it would be a retrograde step to concentrate further on the elaboration of alternatives.

Many *ad hoc* informal groups met to consider specific issues under the guidance of the Committee officers; while open to all, the groups were generally of manageable size. An impressive number of informal draft articles emerged from these groups. These articles are reflected in the single negotiating text and are likely to command broad support. They deal with virtually all of the traditional aspects of the territorial sea regime, including baselines and innocent passage, and the high seas regime, with some technical changes in and elaborations of the existing regimes. An informal group of moderates elaborated a set of articles on unimpeded passage of straits used for international navigation.

The Evensen Group produced a "sixth revision" text on the economic zone on April 16, 1975, which was circulated to all delegations. This text reflects a broad trend of opinion. However, its circulation was followed by efforts by extreme territorialists in the Group of 77 to make the economic zone more coastally oriented and by efforts by landlocked and geographically disadvantaged states to secure greater rights of access to fisheries of neighboring coastal states. On fisheries, both the Evensen text and the single negotiating text include articles on conservation and full utilization and an article on anadromous fish (salmon) protecting the interests of the state of origin. While no agreement has yet emerged on continental shelf jurisdiction beyond 200 miles, both the latest draft Evensen text (still under consideration) and the single negotiating text reflect the view of many moderates that coastal state jurisdiction extending to a

<sup>8</sup> *Ibid.*



precisely defined limit of the continental margin beyond 200 miles coupled with revenue sharing beyond 200 miles is the only way to achieve widespread agreement.

### 1. *The Territorial Sea and Contiguous Zone*

The single negotiating text reflects the general view expressed by delegations in favor of a maximum limit of 12 nautical miles for the territorial sea and retention of existing regimes regarding baselines and innocent passage with some elaboration and technical changes. While Ecuador formally revived a proposal for a 200-mile territorial sea,<sup>9</sup> it received little support; even some supporting statements were ambiguous.

The provisions in the single negotiating text on baselines from which the breadth of the territorial sea is measured contain some interesting new elements<sup>10</sup> not found in the 1958 Convention on the Territorial Sea and the Contiguous Zone.<sup>11</sup>

Considerable time was devoted to an elaboration of the rule in the 1958 Territorial Sea Convention that passage is innocent so long as it is not prejudicial to the peace, good order, or security of the coastal state.<sup>12</sup> While doubts were expressed as to whether an exhaustive list of non-innocent activities could be prepared, others noted that the goal of "objectivizing" innocent passage indicated the desirability of attempting such an approach. Article 16 elaborates a dozen activities which would render

<sup>9</sup> A/CONF.62/C.2/L.88, April 18, 1975.

<sup>10</sup> Article 5 provides that in the case of islands situated on atolls or of islands having fringing reefs, the baseline shall be the seaward edge of the reef. Article 6 provides that straight baselines may connect appropriate points along the furthest seaward extent of the low-water line notwithstanding subsequent regression of the low-water line where, because of the presence of a delta or other natural conditions, the coastline is highly unstable. Some attempts were made to define historic bays with greater precision; it is indicative of the general workmanlike atmosphere that after a few meetings on the issue it was recognized that the effort could be very time consuming and might adversely affect progress. Attempts by one delegation to introduce a new open-ended concept of historic waters met widespread opposition.

Article 10, one of a number that takes account of new technological developments, provides that offshore installations and artificial islands shall not be considered as permanent harbour works for purposes of measuring the territorial sea; it is the logical companion of Article 48 (economic zone), which expands the scope of a similar rule in Article 5 of the Continental Shelf Convention and provides that artificial islands, installations, and structures have no territorial sea of their own and that their presence does not affect the delimitation of the territorial sea or other forms of coastal state jurisdiction.

A similar adaptation to change in the rules of innocent passage is effected in Article 22, also based on the work of an informal Committee II group. The article repeats the rule in Article 16(2) of the Territorial Sea Convention that the coastal state may take the steps necessary to prevent any breach of the conditions to which admission to internal waters is subject, but also extends it to "ships proceeding to . . . a call at a port facility outside internal waters."

<sup>11</sup> 15 UST 1606; TIAS No. 5639; 516 UNTS 205; 52 AJIL 851 (1958).

<sup>12</sup> *Id.*, Art. 14.

passage prejudicial to the peace, good order, or security of the coastal state.<sup>13</sup>

The right of the coastal state to regulate innocent passage was not dealt with in detail in the Territorial Sea Convention. Article 18 of the single negotiating text elaborates the scope of this regulatory power and deals with both navigational safety and prevention of pollution; it also contains a proviso that coastal state laws and regulations "shall not apply to or affect the design, construction, manning or equipment of foreign ships or matters regulated by generally accepted international rules unless specifically authorized by such rules." This proviso is likely to be controversial. While the text of Article 20, paragraph 3 in the Committee III draft on Protection and Preservation of the Marine Environment is unclear, its intended effect is apparently to give the coastal state more regulatory latitude to adopt higher standards in the territorial sea, provided they do not hamper innocent passage. Article 21 of the territorial sea chapter, in addition to specifying that the coastal state shall not discriminate in form or in fact against the ships of any state or against ships carrying cargoes to, from, or on behalf of any state, provides that the coastal state shall not "hamper" innocent passage or "impose requirements on foreign ships which have the practical effect of denying or prejudicing the right of innocent passage." The complex nature of the problem of pollution regulation was widely recognized when a few states proposed the superficially enticing idea of stating that pollution is not innocent.

Article 23 provides that a ship that does not comply with coastal state "laws and regulations concerning navigation" shall be liable for any damage caused to the coastal state. It also provides for coastal state liability if it "acts in a manner contrary to the provisions of these articles and loss or damage results to any foreign ship exercising the right of innocent passage."

After some confusion, a distinction was made between the exercise of customs and fiscal jurisdiction over offshore installations and the rights associated with the traditional contiguous zone.<sup>14</sup> Thus, both the Evensen text and the single negotiating text specify that the coastal state can establish customs, fiscal, immigration, and sanitary regulations with respect to installations under its jurisdiction throughout the economic zone. Nevertheless, a number of states continued to argue in favor of a traditional contiguous zone, directed at ships, extending somewhat beyond a 12-mile territorial sea, in which the coastal state may exercise the control necessary to prevent and punish infringement of its customs, fiscal, immigration, or sanitary regulations in its territory or territorial sea; others felt this was unnecessary. Article 33 would permit such a zone to extend up to 24

<sup>13</sup> Those who recognize the humanitarian origins of the law of the sea of ancient times and its implicit "duty to rescue" are likely to welcome new textual confirmation in the rule that the list does not apply to specified activities "for the purpose of rendering assistance to persons, ships or aircraft in danger or distress."

<sup>14</sup> See Territorial Sea Convention, note 11 *supra*, Art. 24.

nautical miles from the baseline from which the breadth of the territorial sea is measured.

## 2. Straits Used for International Navigation

The importance of the straits issue to the overall negotiations has long been recognized. At Geneva, there was increased sensitivity to the need to assure passage of such straits and to avoid establishing a basis for arbitrary interference with such passage. For some time, moderates had been searching for a rational solution which was "neither free transit nor innocent passage." In other words, a solution which would accommodate both the interests in passage and the concerns of straits states regarding such problems as navigational safety and pollution. The single negotiating text, which drew upon the efforts of a group of moderates from all regions, reflects this trend.

A right of "transit passage" would be established for "straits which are used for international navigation between one area of the high seas or an exclusive economic zone and another area of the high seas or an exclusive economic zone," except where the strait is formed by an island of the coastal state and a high seas or economic zone route of similar convenience exists seaward of the island.<sup>15</sup> "Transit passage is the exercise in accordance with the provisions of this Part of the freedom of navigation and overflight solely for the purpose of continuous and expeditious transit of the strait. . . ."<sup>16</sup> Article 43 prohibits suspension of transit passage.

Virtually all of the remaining provisions deal with the concerns of strait states. Article 34 specifies that the regime of passage through straits "shall not in other respects affect the status of the waters forming such straits nor the exercise by the strait State of its sovereignty or jurisdiction over such waters. . . ." Article 39 requires vessels and aircraft *inter alia* to proceed without delay through the strait; to refrain from the threat or use of force against a strait state in violation of the UN Charter; to refrain from any activities other than those incident to their normal modes of continuous and expeditious transit unless rendered necessary by *force majeure* or by distress; and to comply with applicable international safety and pollution regulations. Article 40 permits the straits state to designate and substitute sealanes and to prescribe traffic separation schemes after adoption of its proposals by the competent international organization, which "may adopt only such sealanes and separation schemes as may be agreed with the strait State."

Article 41 deals with perhaps the most sensitive problem: the regulatory rights of the strait state. It permits the strait state to make laws and regulations regarding transit passage relating to:

- (a) the safety of navigation and the regulation of marine traffic as provided in article 40;

<sup>15</sup> SNT, PART II, Art. 38.

<sup>16</sup> *Ibid.*

(b) the prevention of pollution, giving effect to applicable international regulations regarding the discharge of oil, oily wastes and other noxious substances in the strait;

(c) with respect to fishing vessels, the prevention of fishing, including the stowage of fishing gear;

(d) the taking on board or putting overboard of any commodity, currency or person in contravention of the customs, fiscal, immigration or sanitary regulations of the strait State.

It provides that such laws and regulations shall be nondiscriminatory, and shall not have "the practical effect of denying, hampering or impairing the right of transit passage." Foreign ships "shall comply with such laws and regulations." With respect to the question of remedies in cases where there is sovereign immunity, that is where warships, government non-commercial ships, and state aircraft are involved, the article provides that the flag state "shall be responsible for . . . loss or damage . . . to a strait State or other State in the vicinity of the strait" resulting from acts by such ships or aircraft contrary to the Convention or such coastal state laws and regulations.

Article 35 makes clear that the drawing of straight baselines in accordance with the rules provided for in the territorial sea chapter cannot alter passage rights in straits used for international navigation established in the treaty. This result should be obvious, as baselines have been drawn across navigational channels in very important straits, but the issue was the source of some confusion at Geneva. Since the article makes clear that the straits chapter does not affect other forms of internal waters and does not alter the "used for international navigation" test, it may be hoped that the concerns expressed have been allayed.

Article 44 applies the regime of nonsuspendable innocent passage, as in the Territorial Sea Convention,<sup>17</sup> in straits used for international navigation other than those to which transit passage applies; such other straits include straits used for international navigation between an area of the high seas or economic zone and the territorial sea of a foreign state.

### 3. *The Economic Zone*

While foreshadowed by other developments in the past few decades, the economic zone is a new concept of critical importance. The articles that would establish a 200-mile economic zone affect more interests of more states than any other aspect of the single negotiating text. They attempt to deal comprehensively with activities in an area that embraces perhaps 40% of the sea and in which most of the known hydrocarbons and commercial fisheries of the sea are found. Ships would have to navigate through the economic zone of a third state to communicate with a majority of coastal states in the world.

<sup>17</sup> Territorial Sea Convention, note 11 *supra*, Art. 16(4).

In terms of the actual negotiations, there can be no doubt that the fundamental characteristic of the zone is an accommodation between coastal state and other interests, with a different balance struck with respect to different types of activities in the zone. It is most coastal or "territorial" in its treatment of the sovereign rights of the coastal state over seabed resources of the zone; it is most free or "international" in its treatment of navigation, overflight, and similar uses. But even with respect to these activities, on the one hand, the coastal state sovereign rights are subject to duties designed to protect other uses<sup>18</sup> and the marine environment,<sup>19</sup> and, on the other hand, the freedoms of all states are subject to traditional high seas duties<sup>20</sup> and environmental duties,<sup>21</sup> as well as the duty to have "due regard to the rights and duties of the coastal State."<sup>22</sup>

The single negotiating text was influenced by the long negotiations that resulted in the "sixth revision" Evensen Group text. That group devoted the better part of its time to the economic zone at Caracas and Geneva, and between sessions. It included chiefs of delegation in their personal capacity from about 40 of the most active Committee II participants from all regions and interest groups.

One significant difference between the Evensen text and the single negotiating text is in Article 45, the "chapeau" which elaborates the rights of the coastal state in the zone.

Article 1, paragraph 1 of the Evensen Group sixth revision text reads as follows:

The coastal State has in an area beyond and adjacent to its territorial sea, known as the exclusive economic zone:

(a) Sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the seabed and subsoil and the superjacent waters;

(b) Jurisdiction with regard to other activities for the economic exploration and exploitation of the zone, such as the production of energy from the water, currents and winds;

(c) Jurisdiction as provided for in this Convention with regard to:  
(i) the preservation of the marine environment,  
(ii) scientific research,  
(iii) the establishment and use of artificial islands, installations and similar structures, including customs, fiscal, health and immigration regulations pertaining thereto;

(d) Other rights and duties provided for in this Convention.

<sup>18</sup> SNT, PART II, Arts. 45(2), 48.

<sup>19</sup> *Id.*, Art. 68 (applicable within the 200-mile zone pursuant to Art. 82); *see* SNT, PART III, Protection and Preservation of the Marine Environment, Arts. 4, 17, 41.

<sup>20</sup> SNT, PART II, Art. 47(2).

<sup>21</sup> *See* SNT, PART III, Protection and Preservation of the Marine Environment, Arts. 4, 20, 26, 41.

<sup>22</sup> SNT, PART II, Art. 47(3).

Unlike the Evensen text, Article 45 of the single negotiating text<sup>23</sup> does not distinguish between statements that are intended to establish jurisdiction (*e.g.*, the sovereign rights of the coastal state over resources) and statements that are intended mainly as a summary indication of rights elaborated elsewhere in the Convention (*e.g.*, pollution and scientific research, which are within the mandate of Committee III). In particular, Article 45 omits the qualifying words "as provided for in this Convention" in describing coastal state jurisdiction with respect to preservation of the marine environment, scientific research, and installations, and characterizes scientific research jurisdiction as "exclusive." The effect of course is to prejudice the outcome of issues and, in particular, to imply comprehensive and unlimited subject-matter jurisdiction where this has not been agreed. At least where vessel-source pollution is concerned, even the implication is contrary to the general trend of the negotiations in favor of freedom of navigation and international standards.

Another significant difference is in Article 47. One of the most difficult aspects of the Evensen Group's negotiation was the achievement of balance between the duty of the coastal state to have due regard for navigation and other freedoms and the duty of states exercising those freedoms to have due regard for the rights of the coastal state. Article 47 upsets this balance, probably unintentionally, by providing that "States . . . shall comply with the laws and regulations enacted by the coastal State in conformity with the provisions of this Part and other rules of international law." The problem is that this clause appears, not in an article dealing with activities such as mining or fishing over which the coastal state will have regulatory and enforcement jurisdiction, but in the article dealing with navigation and other freedoms which are not in principle subject to coastal state jurisdiction. It will, it is hoped, be recognized that this is largely a drafting problem.

A third significant difference is that, aside from a cross-reference to the rights of the coastal state over scientific research, to be elaborated in the chapters on that subject, the Evensen text does not deal with the issue. Article 49 of the single negotiating text addresses the issue<sup>24</sup> and, by providing for coastal state consent for "any research concerning the economic

<sup>23</sup> Article 45 reads in pertinent part as follows:

1. In an area beyond and adjacent to its territorial sea, described as the exclusive economic zone, the coastal State has:

(a) sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether renewable or non-renewable, of the bed and subsoil and the superjacent waters;

(b) exclusive rights and jurisdiction with regard to the establishment and use of artificial islands, installations and structures;

(c) exclusive jurisdiction with regard to:

(i) other activities for the economic exploitation and exploration of the zone, such as the production of energy from the water, currents and winds; and

(ii) scientific research;

(d) jurisdiction with regard to the preservation of the marine environment, including pollution control and abatement;

(e) other rights and duties provided for in the present Convention.

<sup>24</sup> Article 71 applies the Article 49 rule *mutatis mutandis* to research concerning the continental shelf and undertaken there.

zone and undertaken there," clearly prejudices the main scientific research issue under negotiation in the Third Committee.

With respect to artificial islands and installations, Article 48, paragraph 1 of the single negotiating text provides:

In the exclusive economic zone, the coastal state shall have the exclusive right to construct and to authorize and regulate the construction, operation and use of:

- (a) artificial islands;
- (b) installations and structures for the purposes provided for in article 45 and other economic purposes;
- (c) installations and structures which may interfere with the exercise of the rights of the coastal State in the zone.

This issue has undergone a very long period of difficult discussion in the Evensen Group and elsewhere. The text is an attempt to bridge the gap between those that wished to maintain the strict economic-noneconomic distinction inherent in the zone and those that did not by resolving the accommodation of conflicting uses problem in favor of the coastal state. It is clear that all artificial islands and all resource and other economic offshore installations (*e.g.*, artificial deep water ports) are *ipso facto* subject to coastal state exclusive rights; however, it is equally clear that the "may interfere" test in subparagraph (c) "tilts" heavily toward the coastal state even with respect to noneconomic installations in the economic zone. It should also be noted that Article 67 gives the coastal state "the exclusive right to authorize and regulate drilling on the continental shelf for all purposes"; the Article 62 definition of the continental shelf includes the full 200-mile zone. While arms control questions are beyond the scope of the Law of the Sea Conference, the provisions and prohibitions of the Seabed Arms Control Treaty<sup>25</sup> are of course also relevant; its parties include the United Kingdom, United States, and U.S.S.R.

The question of the juridical status and the rights enjoyed by all states in the economic zone was one of the most difficult aspects of the negotiations. The single negotiating text reflects the clear consensus in favor of "the freedoms of navigation and overflight and of the laying of submarine cables and pipelines and other internationally lawful uses of the sea related to navigation and communication,"<sup>26</sup> on the one hand, and coastal state "sovereign rights for the purpose of exploring and exploiting, conserving and managing the natural resources, whether renewable or non-renewable,"<sup>27</sup> on the other hand. The problem centered on the "residual rights" which the Convention does not attribute either to the coastal state or to all states. This is linked to the question whether the status of the economic

<sup>25</sup> Treaty on the Prohibition of the Emplacement of Nuclear Weapons and other Weapons of Mass Destruction on the Seabed and the Ocean Floor and in the Subsoil thereof, 23 UST 701, TIAS No. 7337 (1971). The treaty entered into force in 1972 and will, by its terms, be reviewed in 1977.

<sup>26</sup> SNT, PART II, Art. 47(1).

<sup>27</sup> *Id.*, Art. 45(1)(a).

zone is high seas (without prejudice, of course, to the specified rights of the coastal state in the zone).

The solution proposed in the single negotiating text has a number of elements. On the one hand, Article 73 defines the "high seas" as excluding the economic zone, reflecting the often expressed view that the zone is neither territorial sea nor high seas, but *sui generis*. On the other hand, it attempts to reflect the view that the economic zone does not alter in concept the exercise of high seas freedoms being preserved. Article 47 incorporates by reference most of the articles of the high seas chapter (excluding the definition of the high seas, the enumeration of high seas freedoms, and fishing provisions) and other pertinent rules of international law "in so far as they are not incompatible with the provisions of this Part."

With respect to the residuum, Article 47(3) provides:

In cases where the present Convention does not attribute rights or jurisdiction to the coastal State or to other States within the exclusive economic zone, and a conflict arises between the interests of the coastal State and any other State or States, the conflict should be resolved on the basis of equity and in the light of all the relevant circumstances, taking into account the respective importance of the interests involved to the parties as well as to the international community as a whole.

The exclusion of the economic zone from the definition of the high seas was strongly opposed by some states.

The basic thrust of the economic zone is, of course, resource jurisdiction. Its most "revolutionary" aspect is the elimination of freedom of fishing and the substitution of coastal state sovereign rights over the exploration, exploitation, conservation, and management of living resources. Such a drastic alteration, coupled with the problems associated with the migratory and other biological characteristics of fish stocks, necessarily raises a number of practical problems that require resolution if a sound and widely acceptable agreement is to be reached. Therefore, it is not surprising that most of the articles in the economic zone section deal with fishing.

There are six basic elements in the treatment of fisheries in the single negotiating text:

(1) The "sovereign rights" of the coastal state.<sup>28</sup> Fishing is subject to the jurisdiction and broad regulatory, and management powers of the coastal state.<sup>29</sup>

(2) The coastal state duty to conserve. It has the duty to determine the allowable catch and adopt other conservation measures "designed to maintain or restore populations of harvested species at levels which can produce the maximum sustainable yield, as qualified by relevant environmental and economic factors"; to ensure "that the maintenance of the living resources . . . is not endangered by over-exploitation"; and "to take into consideration the effects on species associated with or dependent upon harvested species."<sup>30</sup>

<sup>28</sup> *Ibid.*

<sup>29</sup> *Id.*, Arts. 50, 51.

<sup>30</sup> *Id.*, Art. 50.



(3) The coastal state priority allocation and duty to ensure optimum utilization. It has the duty to "determine its capacity to harvest the living resources" of the zone and, where it "does not have the capacity to harvest the entire allowable catch," to "give other States access to the surplus of the allowable catch" pursuant to coastal state regulations "consistent with the provisions of the present Convention." Among the factors the coastal state "shall take into account" in granting such access is "the need to minimize economic dislocation in States whose nationals have habitually fished in the zone or which have made substantial efforts in research and identification of stocks."<sup>31</sup>

(4) Special provisions for highly migratory species,<sup>32</sup> anadromous species,<sup>33</sup> catadromous species,<sup>34</sup> marine mammals,<sup>35</sup> and sedentary species.<sup>36</sup>

(5) Special provisions regarding access of landlocked and "geographically disadvantaged" states to fisheries in the economic zone of their neighbors.<sup>37</sup> These states publicly indicated their disagreement with the Evensen text and the Group of 77 text on the grounds that the access rights were insufficient.

(6) Comprehensive fisheries enforcement rights for coastal states in the zone. These include "boarding, inspection, arrest, and judicial pro-

<sup>31</sup> *Id.*, Art. 51.

<sup>32</sup> *Id.*, Art. 53. With respect to enumerated highly migratory species such as tuna, the coastal state and other states whose nationals fish such species in the region are required to "co-operate directly or through appropriate international organizations with a view to ensuring conservation and promoting the objective of optimum utilization of such species throughout the region, both within and beyond the exclusive economic zone." The Evensen sixth revision text does not contain a precise proposed article on highly migratory species, which could not be completed due to continuing differences.

<sup>33</sup> *Id.*, Art. 54. With respect to anadromous species such as salmon, the states "in whose rivers anadromous stocks originate shall have the primary interest in and responsibility for such stocks," may establish total allowable catches, regulate fishing for such stocks within their economic zones and beyond economic zones of other states, and have the duty to cooperate in minimizing economic dislocation in other states fishing these stocks, which is the only exception to the rule that fishing for anadromous stocks "shall be conducted only in waters within exclusive economic zones" (a reference intended in the Evensen text to embrace territorial and internal waters as well). With respect to anadromous stocks migrating through their economic zones, other states must "cooperate with the State of origin with regard to the conservation and management of such stocks."

<sup>34</sup> *Id.*, Art. 55. With respect to catadromous species such as eels, there is a provision giving special rights to the "coastal State in whose waters catadromous species spend the greater part of their life cycle."

<sup>35</sup> *Id.*, Art. 53(3).

Nothing in the present Convention shall restrict the right of a coastal State or international organization, as appropriate, to prohibit, regulate and limit the exploitation of marine mammals. States shall co-operate either directly or through appropriate international organizations with a view to the protection and management of marine mammals.

<sup>36</sup> *Id.*, Art. 56. This article excludes sedentary species of the continental shelf from the application of the economic zone chapter, thus leaving the sovereign rights of coastal states under Article 63 unqualified by the economic zone duties.

<sup>37</sup> *Id.*, Arts. 57-59; see also Art. 51(3).

ceedings," provided that arrested vessels and their crews "shall be promptly released upon the posting of reasonable bond or other security" and that "penalties for violations of fisheries regulations may not include imprisonment" in the absence of agreement to the contrary.<sup>38</sup>

The nature of the provisions regarding highly migratory species and the provisions regarding access of landlocked and "geographically disadvantaged" states were very controversial issues in Geneva and will probably be the focus of attention on fisheries issues during intersessional consultations.

The question of the delimitation of the economic zone and the continental shelf between neighboring coastal states is a highly divisive one which, in the last analysis, is essentially bilateral in character. The interest of the community in general is in providing a legal basis for the peaceful resolution of the problem by the neighboring states concerned. This can be achieved through the elaboration of general substantive rules, procedures, or both.<sup>39</sup>

The approach to delimitation issues in the 1958 Continental Shelf Convention is to lay down the "equidistance/special circumstances" rule and leave the matter to bilateral negotiation.<sup>40</sup> While a different rule is enunciated in the *North Sea Continental Shelf* cases, that judgment (necessarily limited by the terms on which the case was submitted) is also primarily concerned with substance.<sup>41</sup> At present, whatever the merits of their arguments, it is clear that some states are relying on the special circumstances exception in the Continental Shelf Convention, the *North Sea Continental Shelves* cases judgment, or both, as a basis for opposing the automatic application of the equidistance principle. There are widely varying views on both the substance and application of international law on the issue.

<sup>38</sup> *Id.*, Art. 60.

<sup>39</sup> Where fisheries are concerned, delimitation is not the only issue. There is an obvious need to agree upon coordinated conservation and allocation measures for stocks which migrate across national limits; Article 52 confirms this need. To some extent, similar considerations are relevant in the case of fluid nonliving resources.

<sup>40</sup> Convention on the Continental Shelf; 15 UST 471; TIAS No. 5578; 499 UNTS 311; 52 AJIL 858 (1958). Art. 6.

<sup>41</sup> *North Sea Continental Shelf*, Judgment, [1969] ICJ REP. 3, (Special Agreements submitting the cases at 7-8; findings at 53-54). The Special Agreements submitting the cases requested the Court to decide what "principles and rules of international law are applicable to the delimitation" as between the parties, specifying that the parties would "delimit the continental shelf in the North Sea as between their countries by agreement in pursuance of the decision requested" from the Court. The Court decided that the equidistance rule was not opposable to the Federal Republic of Germany, which was not a party to the Continental Shelf Convention; found that there is "no other single method of delimitation the use of which is in all circumstances obligatory"; and elaborated substantive criteria based on a theory of "natural prolongation" to be applied by the Federal Republic, Denmark, and the Netherlands in delimiting "by agreement" their respective areas of jurisdiction. SNT Article 61(1) draws upon that part of paragraph C(1) of the Judgment which states, "delimitation is to be effected by agreement in accordance with equitable principles, and taking into account all of the relevant circumstances," omits the substantive geographic qualifications and criteria in the Judgment, but adds the language, "employing, where appropriate, the median or equidistance line."

Article 61 and the essentially identical Article 70 regarding the continental shelf place primary emphasis on procedure; they emphasize the community interest in keeping the peace. Article 61 provides in pertinent part:

(1) The delimitation of the exclusive economic zone between adjacent or opposite States shall be effected by agreement in accordance with equitable principles, employing, where appropriate, the median or equidistance line, and taking account of all the relevant circumstances.

(2) If no agreement can be reached within a reasonable period of time, the States concerned shall resort to the procedures provided for in Part . . . (settlement of disputes).

(3) Pending agreement, no State is entitled to extend its exclusive economic zone beyond the median line or the equidistance line.

The viability of paragraph 3 as an interim rule is largely dependent upon the right of a state to resort to compulsory dispute settlement under paragraph 2 to determine that "a reasonable period of time" has elapsed and to resolve the issue; otherwise the party that prefers the median or equidistant line could simply refuse to agree on another line. In effect, the two paragraphs largely relieve the pressure on states to take potentially conflicting steps in disputed areas in order to protect their claims. It is not clear what the reaction to this imaginative new approach will be. There was some opposition in the Dispute Settlement Group to compulsory dispute settlement of maritime boundaries between neighboring states.<sup>42</sup> Since boundary disputes can be among the most dangerous, the substantial contribution that the procedural ideas underlying draft Articles 61 and 70 could make to avoiding such dangers should be carefully weighed.

The differences in the negotiations over the entitlement of small islands to an economic zone and continental shelf are, in practical terms, closely linked to the delimitation problem. No specific reference is made to islands in the articles on delimitation. The issue would presumably be raised under the reference to "equitable principles" and "all the relevant circumstances" in Articles 61 and 70. However, Article 132 of the single negotiating text provides, "Rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf."

#### 4. *The Continental Shelf*

The basic and still unresolved issue regarding the continental shelf is whether it would be defined to include continental margin areas beyond 200 miles, thereby placing seabed resource exploration and exploitation of the entire margin under coastal state jurisdiction.

<sup>42</sup> Annex I, Art. 17(3)(b) of the dispute settlement group text and SNT (Settlement of Disputes) Art. 18(2)(b), note 3 *supra*, contain a qualified exception to the compulsory procedures in this connection.

Articles 62 and 69 reflect the view of many moderates that an accommodation which combines coastal state jurisdiction and a revenue-sharing obligation with respect to mineral exploitation of the margin beyond 200-miles is the only practical way to protect the general interest in widespread agreement. There was widespread opposition to revenue sharing with respect to areas within 200 miles.

In response to the concerns of a number of states that the outer edge of the margin be precisely defined, work is continuing in the Evensen Group on a more precise definition that might incorporate review by an international commission, which would certify the result to the coastal state and the international Authority for the seabed.

Article 69 does not specify the amount of revenue sharing, but does reflect the view of the United States and others that the obligation should be stated as a percentage of the value of mineral production at the site in order to ensure greater simplicity and certainty of expectations. It also reflects the view of some countries that the coastal state might, if it wishes, make its contribution in kind as a percentage of the "volume of production" at the site. Some states with broad margins argued that a system of profit sharing would be more feasible, as it would take account of the need to recover the costs of the large investments likely to be required for production in deep areas that are far from shore prior to making any fixed payments to the international community. However, supporters of a formula based on a percentage of the value of production noted the difficulties in determining profits on a uniform and equitable basis under different economic, accounting, and tax systems.

In order to illustrate how a system of contributions might work and might accommodate in some measure the views of those advocating profit sharing, the United States informally presented a specific idea with respect to revenue sharing from the area beyond 200 miles, based on an increasing percentage of the value of production at the site.<sup>43</sup>

Article 69 also provides for the international Authority to determine the extent of developing country revenue-sharing obligations. Some states, including the United States, have indicated that they can support discrimination in the distribution of these funds in favor of developing countries, but not discriminatory contribution rates. It is, after all, the rate and value of production that would determine the contribution. The underlying accommodation that revenue sharing represents is that, in exchange for agreeing to coastal state jurisdiction to the outer edge of the margin, the international community would receive a share of the benefits of mineral

<sup>43</sup> After five years of production at a site, the coastal state's obligation to share revenues would begin at one percent of wellhead value, and thereafter increase by one percent per year until it reached five percent in the tenth year, after which it would remain at five percent. Experts on the U.S. Delegation calculated that for a field producing 700 million barrels of oil through a 20-year depletion period, assuming a value of \$11 per barrel, the total amount of the revenue sharing would be \$130 million. The oil and other minerals themselves, and additional revenues collected by the coastal state, would of course remain with the coastal state.

exploitation. Very few developing coastal states are likely to be affected to a significant degree. The acceptability of this basis of accommodation on the margin issue would be jeopardized by injecting the broad philosophical and political difficulties inherent in discriminatory rates of contribution. Perhaps one way around the problem might be to allow some coastal state flexibility as to the development organizations receiving contributions, which might include regional development organizations associated with the United Nations.

The questions of drilling, scientific research on the continental shelf, sedentary species, and delimitation between opposite and adjacent states were discussed in connection with the economic zone. While Article 66 would treat installations on the continental shelf beyond the economic zone in the same manner as those within the zone, there was sentiment for taking, with respect to the area beyond 200 miles, the approach of Article 5 of the 1958 Continental Shelf Convention, which refers to coastal state jurisdiction only in respect of installations for the exploration and exploitation of the natural resources of the continental shelf.

### 5. *The High Seas*

The most important question raised by the high seas chapter is the definition of the high seas. The implications of defining the high seas to exclude the economic zone have been discussed in connection with the economic zone.

Informal consultations on the high seas held by Committee II were very productive. While the questions of the definition of the high seas, high seas freedoms, and living resources were deferred pending consideration of the economic zone, single draft texts on which the single negotiating text is based were prepared by the participants. These texts are largely derived from the existing high seas regime as codified in the 1958 High Seas Convention,<sup>44</sup> with some elaborations.<sup>45</sup>

Articles 103 and 104, taken together, make it clear that freedom of fishing on the high seas beyond the economic zone is "subject to . . . the duty to adopt, or to cooperate with other States in adopting, such measures for their respective nationals as may be necessary for the conservation of the living

<sup>44</sup> Convention on the High Seas; 13 UST 2312; TIAS No. 5200; 450 UNTS 82; 52 AJIL 842 (1958).

<sup>45</sup> Notable elaborations are contained in Article 80, which develops the obligations of the flag state with respect to ships flying its flag; Article 94, which provides for international cooperation in the suppression of illicit traffic in narcotic drugs and psychotropic substances; Article 95, which subjects any person engaged in "unauthorized broadcasting" on the high seas to arrest and prosecution, *inter alia*, by a state "where the transmissions can be received or . . . where radio communication is suffering interference"; Article 97, which applies the coastal state right of hot pursuit to violations of applicable coastal state laws and regulations in the economic zone or on the continental shelf, including safety zones around continental shelf installations; and Article 100, which expands the obligation of flag states to ensure that their vessels do not break or injure submarine cables and pipelines.

resources of the high seas." In addition, where the same stock or stocks of associated species occur both within the economic zone and "in an area beyond and adjacent to the zone," Article 52(2) provides for the coastal state and states fishing such stocks in the adjacent area to seek to agree on conservation measures in the adjacent area. While this provision does not speak of a "special interest" of the coastal state in conservation, its practical effect, particularly if there is compulsory dispute settlement, would be to provide some protection of the conservation interests of the coastal state. The special treatment for certain types of species is elaborated in the economic zone and continental shelf articles.<sup>46</sup>

## 6. *Landlocked States*

Article 109 provides that landlocked states "shall have the right of access to and from the sea for the purpose of exercising the rights provided for in the present Convention." Terms and conditions would be specified in bilateral, subregional, or regional agreements. Transit states "have the right to take all measures to ensure that the rights provided for in this Part shall in no way infringe their legitimate interests." Traffic in transit would be exempt from customs duties, taxes, and charges other than those for specific services rendered.<sup>47</sup>

The importance of the issue of access to and from the sea is related not only to the increased number of landlocked states in the international community, particularly in Africa, but to the fact that the means and commercial incentives in developing coastal states for transporting the trade of developing landlocked states may not be entirely equal to the need.<sup>48</sup>

Landlocked states are understandably concerned about ensuring that their rights are unambiguous. Transit states are understandably concerned about assuming treaty obligations they would have difficulty meeting. Negotiations on this issue in Geneva were difficult, although there was broad agreement on the need to provide access to the sea for landlocked states; with one or two exceptions, there was no evidence of resistance in principle to a clear right of access. African coastal and landlocked states are the most broadly affected; it is notable that they have shown considerable sensitivity and statesmanship on this issue.

## 7. *Archipelagos*

The single negotiating text seeks to accommodate the desire of certain island nations to enclose the waters of their archipelagos with the interests of other nations in protecting the seas from unreasonably broad claims and in protecting navigation and overflight.

<sup>46</sup> See notes 32-36, *supra*.

<sup>47</sup> SNT, PART II, Art. 111.

<sup>48</sup> "Transit States may request the land-locked States concerned to co-operate in constructing or improving" means of transport to give effect to the right of access. *Id.*, Art. 113.

Article 117 provides that "archipelagic State" means a State constituted wholly by one or more archipelagos and may include other islands." The concept does not apply to islands of continental states. There was strong opposition to any such extension of the concept. The purpose of Article 131, which says the archipelago provisions are "without prejudice to the status of oceanic archipelagos forming an integral part of the territory of a continental State," is unclear.

The articles establish criteria in terms of length of line and land-to-water ratio for drawing lines around an island group.<sup>49</sup> Waters within such lines are "archipelagic waters" where the archipelagic state exercises sovereignty "subject to the provisions of this section."<sup>50</sup> The territorial sea, contiguous zone, economic zone, and continental shelf would be measured seaward of these lines.<sup>51</sup>

Article 124 establishes a right of "archipelagic searoutes passage" in searoutes and air routes designated by the archipelagic state "suitable for the safe, continuous and expeditious passage of foreign ships and aircraft" through archipelagic waters. Criteria for the width and location of lanes are elaborated. Article 124(3) defines archipelagic searoutes passage as follows:

Archipelagic searoutes passage is the exercise in accordance with the provisions of the present Convention of the rights of navigation and overflight in the normal mode for the purpose of continuous and expeditious transit through an archipelago between one part of the high seas or an exclusive economic zone and another part of the high seas or an exclusive economic zone.

The provisions regarding the duties of states exercising the right of archipelagic searoutes passage,<sup>52</sup> the designation and international review of searoutes and traffic separation schemes,<sup>53</sup> and the regulatory rights of the archipelagic states with respect to such passage<sup>54</sup> are similar to the provisions regarding transit passage of straits.

In archipelagic waters outside searoutes and air routes, there would be a right of innocent passage subject to temporary and nondiscriminatory suspension by the archipelagic state where essential for the protection of its security.<sup>55</sup> There are also special provisions regarding traditional fishing rights<sup>56</sup> and communication between two parts of the territory<sup>57</sup> of an immediately adjacent neighboring state.

The question of archipelagos is a good example of the delicate problem of promoting a widely acceptable treaty. Inclusion of the concept is of overriding concern to a limited number of states. However, unless the definition is carefully circumscribed and adequate navigation and overflight rights are guaranteed, inclusion of the concept would seriously reduce the chances of a widely acceptable treaty.

<sup>49</sup> *Id.*, Art. 118.

<sup>51</sup> *Id.*, Art. 119.

<sup>53</sup> *Id.*, Art. 124.

<sup>55</sup> *Id.*, Art. 123.

<sup>57</sup> *Id.*, Art. 118(7).

<sup>50</sup> *Id.*, Art. 120.

<sup>52</sup> *Id.*, Art. 125.

<sup>54</sup> *Id.*, Art. 128.

<sup>56</sup> *Id.*, Art. 122.

### 8. *Regime of Islands*

As noted before, Article 132 of the single negotiating text provides that "rocks which cannot sustain human habitation or economic life of their own shall have no exclusive economic zone or continental shelf." Aside from this, all the substantive rules of the Convention applicable to other land territory also apply to an island, defined as a "naturally formed area of land, surrounded by water, which is above water at high tide."

The effect of this text, and the reactions of states to it, are unclear. For example, what if it is the presence of marine resources and the desalination of sea water that render habitation and economic life possible?<sup>68</sup>

### 9. *Enclosed and Semienclosed Seas*

Article 134 provides for cooperation among states bordering enclosed or semienclosed seas in the exercise of their rights and duties under the Convention. Specific reference is made in this regard to coordination with respect to living resources, preservation of the marine environment, and scientific research. Article 135 makes clear that these provisions do not affect the rights and duties of coastal or other states under other provisions of the Convention.

Article 134 is perhaps a somewhat narrower example of the general need for cooperation among neighboring coastal states. It does, however, tend to reflect some efforts already underway or under consideration in such areas as the North Sea, the Mediterranean Sea, the Caribbean Sea, and the Persian Gulf.

### 10. *Territories Under Foreign Occupation or Colonial Domination*

The very heading "territories under foreign occupation or colonial domination" suggests political issues more suitable for discussion in the political organs of the United Nations than in connection with a Convention on the Law of the Sea. The main thrust of Article 136 is to vest offshore resource rights under the Convention in the inhabitants of territories under foreign occupation or colonial domination, a UN Trust Territory, or a territory administered by the UN, "to be exercised by them for their own benefit."

There are few aspects of Article 136 that would be susceptible of interpretation without reference to a particular political point of view. For example, where "a dispute over the sovereignty of a territory under foreign occupation or colonial domination exists," coastal state resource rights "shall

<sup>68</sup> On a more technical level, since even low tide elevations along the coast can be used for establishing baselines under some circumstances (see Arts. 4 and 12), Article 132 arguably should not affect the use of rocks in such situations. Moreover, the relationship to the archipelago articles is unclear; surely, encouraging governments whose populations are dependent on the resources around small islands to seek to resolve their problem through expansion of the archipelago concept would have exactly the opposite effect of that intended by Article 132, and could further complicate the already uncertain situation regarding the ultimate acceptability of an archipelago concept.



not be exercised until such dispute is settled in accordance with the purposes and principles of the Charter of the United Nations." It would seem that, when there is a sovereignty dispute, the disputed area in question would normally be regarded by the claimant state that does not actually control the area as being "under foreign occupation," if not "colonial domination." Do the inhabitants benefit by this? Might third states benefit?

It is perhaps useful to remember that the original stimulus for this article was the significant persistence of colonialism in Africa. That is now changing rapidly. It is also useful to remember that freedom of choice is now the rule, not the exception, applied by former colonial powers to their remaining dependencies. In some cases, these dependencies have clearly indicated a preference to maintain that status; in others, the process is now developing; in still others, the United Nations itself has authorized the non-self-governing relationship. In all these situations, a state cannot assume treaty obligations and then hope that the inhabitants of a dependency will, in the exercise of rights, ensure that the obligations are met. Moreover, precisely how can these inhabitants deal with foreign powers that might encroach upon those rights, if the presumably more powerful "metropolitan" power is prohibited from exercising the rights?

For Americans, particularly as we enter our bicentennial year, the anti-colonial sentiments of Article 136 strike a responsive chord. For many countries of the world, those sentiments were until recently fundamental to their national aspirations and not merely their foreign policies. But the fact remains that, if a state is in illegal control of territory or violating the international rules applicable to the administration of an area and the protection of its inhabitants, the issue is broader than offshore resource jurisdiction and should be dealt with directly in the appropriate forum. No state will normally concede that it is illegally occupying territory. A Law of the Sea Convention cannot resolve the problem; it can create confusion that, as a careful analysis of the potential effects of Article 136 will reveal, could provide a juridical or practical windfall to third states and accordingly reduce their interest in encouraging a just alteration in the situation.

## 11. *Settlement of Disputes*

Article 137 contains a general cross-reference to the application of the provisions of the dispute-settlement chapter of the Convention. This is a necessary aspect of any settlement of Committee II issues.

## THE THIRD COMMITTEE

### 1. *Protection and Preservation of the Marine Environment*

The single negotiating text on protection and preservation of the marine environment largely reflects the results achieved in Caracas on the general articles on the subject and the specific results in the Working Group on

marine pollution in Geneva with respect to monitoring, environmental assessment, landbased pollution, ocean dumping, and pollution from continental shelf activities. In some of these fields such work was not fully completed. The Evensen Group concentrated on the problem of vessel-source pollution, which was not resolved, although a clear trend against coastal state standard setting in the economic zone is reflected in the single negotiating text.

The first chapter, General Provisions, sets out the basic legal obligations to protect and preserve the marine environment and addresses the difficult and controversial problem of balancing these obligations against economic considerations and legitimate uses of the sea. These articles provide in part:

States have the obligation to protect and preserve all the marine environment.<sup>59</sup>

States have the sovereign right to exploit their natural resources pursuant to their environmental policies and they shall, in accordance with their duty to protect and preserve the marine environment, take into account their economic needs and their programmes for economic development.<sup>60</sup>

States shall take all necessary measures consistent with this Convention to prevent, reduce and control pollution of the marine environment from any source using for this purpose the best practicable means at their disposal and in accordance with their capabilities, individually or jointly, as appropriate, and they shall endeavour to harmonize their policies in this connexion.<sup>61</sup>

States shall take all necessary measures to ensure that marine pollution does not spread outside their national jurisdiction and that activities under their jurisdiction or control are so conducted that they do not cause damage by pollution to other States and their environment, nor cause pollution beyond the areas where States exercise sovereign rights in accordance with this Convention.<sup>62</sup>

The measures taken pursuant to these articles shall deal with all sources whatsoever of pollution of the marine environment . . . In taking measures to prevent pollution of the marine environment States shall have due regard to the legitimate uses of the marine environment, which are not incompatible with the provisions of this Convention and shall refrain from unjustifiable interference with such uses.<sup>63</sup>

The second chapter sets out obligations to formulate and elaborate international rules, standards, and recommended practices and procedures for the prevention of pollution;<sup>64</sup> to cooperate in eliminating the effects of pollution and preventing or minimizing damage,<sup>65</sup> and to cooperate in scientific research and data exchange programs regarding pollution and

<sup>59</sup> SNT, PART III, Protection and Preservation of the Marine Environment, Art. 2.

<sup>60</sup> *Id.*, Art. 3.

<sup>61</sup> *Id.*, Art. 4.

<sup>62</sup> *Ibid.*

<sup>63</sup> *Ibid.*

<sup>64</sup> *Id.*, Art. 6.

<sup>65</sup> *Id.*, Art. 8.

its remedies<sup>66</sup> and in working out appropriate scientific criteria for the formulation of international environmental measures.<sup>67</sup>

Chapter Three contains broad provisions on the promotion of scientific, educational, technical, and other assistance to developing countries for the preservation of the marine environment and the prevention of pollution. Such provisions can and should be regarded as an integral part of a global effort to control marine pollution.

Chapter Four obliges states to "endeavour, as much as is practicable" to monitor pollution of the marine environment, and to report the results to the UN Environment Programme or any other competent organization, "which should make them available to all States." While the qualifying language is, at least in tone, regrettable, it is notable that states are also required to keep under surveillance "the effect of any activities which they permit or in which they engage to determine whether these are likely to pollute the marine environment."

Chapter Five provides that States "shall, as far as practicable, assess the potential effects of [planned] activities on the marine environment" where there are "reasonable grounds for expecting that [they] may cause substantial pollution of the marine environment," and report the results of such assessments. This is a good illustration of how a legal development on a national level, in this case the requirement for environmental impact statements in U.S. law,<sup>68</sup> can inspire a parallel development on the international level.

Chapter Six, regarding standards to prevent, reduce, and control marine pollution raises perhaps the most difficult issue in this section. It provides that states "shall establish . . . international rules and standards" regarding vessel-source pollution;<sup>69</sup> "shall establish global and regional rules, standards and recommended practices and procedures" regarding pollution from exploration and exploitation of the seabed (continental shelf) and "from installations under their jurisdiction";<sup>70</sup> "shall endeavour to establish" as soon as possible such global and regional measures regarding ocean dumping;<sup>71</sup> and "shall endeavour to establish" such global and regional measures regarding pollution from atmospheric sources<sup>72</sup> and "from land-based sources, taking into account characteristic regional features, the economic capacity of developing countries and their need for economic development."<sup>73</sup>

In the case of pollution from landbased and atmospheric sources, states are required to establish national laws and regulations, "taking into account internationally agreed rules, standards and recommended practices and procedures." For all sources of marine pollution except landbased and

<sup>66</sup> *Id.*, Art. 9.

<sup>67</sup> *Id.*, Art. 10.

<sup>68</sup> National Environmental Policy Act of 1969, sec. 102; 83 Stat. 853; 42 U.S.C. 4332.

<sup>69</sup> SNT, PART III, Protection and Preservation of the Marine Environment, Art. 20.

<sup>70</sup> *Id.*, Art. 17; *see also* SNT, PART II, Art. 68.

<sup>71</sup> *Id.*, Art. 19.

<sup>72</sup> *Id.*, Art. 21.

<sup>73</sup> *Id.*, Art. 16.

atmospheric sources, there is a requirement that national laws and regulations "shall be no less effective" than international or generally accepted rules and standards; with respect to these sources of marine pollution, the text also applies the "no less effective" rule to internationally "recommended practices and procedures," although questions were raised in Geneva as to the appropriateness of applying the rule to recommendations.

The general approach of these articles is to vest the relevant environmental rights and duties in that state which has jurisdiction over the activity in question. The close relationship between the application of environmental measures and the overall regulation of activities justifies such an approach. There would be the possibility of interference should another state be granted such rights and duties. Thus, a coastal state, with respect to seabed exploitation in its economic zone, and a flag state, with respect to vessels flying its flag, would be obliged to carry out the relevant environmental duties and would have the right to impose more stringent environmental measures than those required by the duty to respect international standards. On the other hand, the duty to develop and respect international standards derives from a recognition of the fact that the state whose activities are the source of pollution is not necessarily the only state affected by such pollution; in some cases, it may not even be the most affected. This is an additional reason for the strong and widespread support for international standards with respect to vessel-source pollution.

Three exceptions to this jurisdictional approach to environmental standards for vessel-source pollution are suggested in Articles 19 and 20 of the single negotiating text:

(1) Dumping of wastes and other matter within a zone of as yet unspecified distance from the coast would require the express approval of the coastal state.<sup>74</sup> It can be argued that dumping is not in essence vessel-source pollution but landbased pollution transported to sea, as the issue of normal vessel operations does not basically arise.

(2) While the language is unclear, it appears that the coastal state would be permitted to establish "more effective" standards for vessel-source pollution in its territorial sea provided they do not have the practical effect of hampering innocent passage.<sup>75</sup> There is an apparent inconsistency of intent with Article 18 in the Committee II text, which would exclude ship design, construction, manning, and equipment from coastal state regulation.

(3) Article 20(5) provides:

Nothing in this Article shall be deemed to affect the establishment by the coastal State of appropriate non-discriminatory laws and regulations for the protection of the marine environment in areas within the economic zone, where particularly severe climatic conditions create obstructions or exceptional hazards to navigation, and where pollution of the marine environment, according to accepted scientific criteria, could cause major harm to or irreversible disturbance of the ecological balance.

<sup>74</sup> *Id.*, Art. 19(3).

<sup>75</sup> *Id.*, Art. 20(3).

Article 20, paragraphs 4 and 6, also contain a procedure for the coastal state to obtain international recognition in the competent international organization for the designation of a "special area" of the economic zone in which the adoption of special mandatory measures for the prevention of pollution from vessels is required. Although the language is somewhat unclear, it would appear that this is intended as a reference to the international adoption of special discharge rules in "special areas" along the lines of the 1973 Marine Pollution Convention, where the term "special area" is used as a term of art.<sup>76</sup>

It must be recognized that freedom of navigation in the economic zone is affected by coastal state rights with respect to vessel-source pollution; this is particularly true with respect to the establishment of standards. International establishment of standards not only protects environmentally affected states, it also protects economically affected states. There has been, and can be, international agreement on the establishment and content of special standards for particular areas where necessary. However, there is no assurance that the appropriate balance of interests will be reflected in a unilateral coastal state decision on such standards, for example as contemplated by Article 20(5).

While the general approach of relying on the state conducting the activity to enforce international standards is reflected in Chapter Seven, both juridical and practical questions arise with respect to vessels.

The juridical problems involved in limiting enforcement of vessel-source pollution laws and regulations to the flag state relate to the rights of the coastal state in ports and in the territorial sea. A state has the right to establish conditions of entry to its ports.<sup>77</sup> In addition, the coastal state is sovereign, subject to its duty to respect innocent passage, in its territorial sea. It has certain regulatory rights with respect to innocent passage.<sup>78</sup>

The practical problem relates to the difficulty of ensuring direct environmental supervision by a flag state over its vessels around the world. Thus, certain special enforcement provisions are contemplated in the single negotiating text.

First, the duty of the flag state to investigate violations "at the documented request of any State," to bring proceedings, and to impose adequate penalties "regardless of where violations occurred" is emphasized.<sup>79</sup>

Secondly, given the fact that pollution enforcement with respect to a vessel voluntarily in a port does not entail the dangers or practical difficulties of foreign actions against a vessel at sea, substantial enforcement rights and duties for the port state are contemplated. These include a duty

<sup>76</sup> International Convention for the Prevention of Pollution from Ships, 1973, IMCO Doc. MP/CONF./WP.35, Nov. 2, 1973 (not yet in force); 12 ILM 1319 (1973).

<sup>77</sup> See Territorial Sea Convention, note 11 *supra*, Art. 16; SNT, PART II, Art. 22(2). The 1973 Marine Pollution Convention, note 76 *supra*, refers to specified enforcement actions by the port state in Articles 5 and 6.

<sup>78</sup> Territorial Sea Convention, note 11 *supra*, Arts. 1, 14, 17; see SNT, PART II, Arts. 1, 14, 18.

<sup>79</sup> SNT, PART III, Protection and Preservation of the Marine Environment, Art. 26.

to investigate and report, if there are "reasonable grounds for believing that a vessel . . . has violated the international rules and standards regardless of where the violation occurred";<sup>80</sup> a right to enforce dumping standards;<sup>81</sup> and a right to institute proceedings if a violation of international discharge standards has occurred in the territorial sea or within an as yet unspecified distance from the coast of either the port state or another state which is a party to the Convention containing the relevant standards and which requests such action by the port state.<sup>82</sup> The port state may arrest the vessel, which is subject to release upon the posting of bond or other reasonable security;<sup>83</sup> the port state must give the flag state six months to institute proceedings before instituting its own proceedings, and thereafter cannot proceed if the flag state "has previously commenced proceedings and has not discontinued those proceedings."<sup>84</sup> Safeguards with respect to port state proceedings include the vessel-release requirement referred to, provisions on double jeopardy and "statute of limitations," and a provision permitting only monetary penalties.<sup>85</sup>

Thirdly, if a coastal state has reasonable grounds for believing a vessel has violated international discharge standards within an as yet unspecified distance from its coast, it may require identification and other specified information, including the next port of call, from the vessel "by radio or other means of communication."<sup>86</sup> Where the discharge violation has been of a "flagrant character causing severe damage or threat of severe damage to the marine environment, or the vessel is proceeding to or from the internal waters of the coastal State," the coastal state has the power to board and inspect.<sup>87</sup> It is required to notify the flag state<sup>88</sup> and it can also request an investigation and proceedings by a port state.<sup>89</sup>

Chapters Six and Seven "do not affect the legal regime of straits used for international navigations" as the relevant pollution provisions regarding transit passage are in the straits articles.<sup>90</sup> The same result should presumably apply to "archipelagic sealand passage" for the same reason.<sup>91</sup>

While there is general agreement on the need for safeguards, the actual enforcement powers of port states and coastal states are likely to continue to be controversial. For example, the United States and others have argued that there are sound environmental reasons not to limit port state enforcement of discharge violations to discharges in specific zones off the coast. Some will regard the coastal state enforcement rights at sea as too broad, and others as too restricted. The question of recourse to compulsory dispute settlement to ensure that environmental duties are met and

<sup>80</sup> *Id.*, Art. 27.

<sup>82</sup> *Id.*, Arts. 27-28.

<sup>84</sup> *Id.*, Art. 28.

<sup>86</sup> *Id.*, Art. 30.

<sup>88</sup> *Id.*, Art. 32.

<sup>90</sup> *Id.*, Art. 39; see SNT, PART II, Arts. 39, 41.

<sup>91</sup> See SNT, PART II, Arts. 125, 128-29.

<sup>81</sup> *Id.*, Art. 25.

<sup>83</sup> *Id.*, Art. 29.

<sup>85</sup> *Ibid.*

<sup>87</sup> *Id.*, Art. 31.

<sup>89</sup> *Id.*, Art. 28.

that exercise of environmental powers is in conformity with the Convention is critically related to the substance of the articles.<sup>92</sup>

The remaining chapters contain provisions on responsibility and liability,<sup>93</sup> vessels entitled to sovereign immunity,<sup>94</sup> other environmental conventions,<sup>95</sup> and a general cross-reference to the chapter on compulsory dispute settlement.<sup>96</sup>

## 2. *Marine Scientific Research*

Negotiations on the question of research in the economic zone and on the continental shelf dominated the work of an informal negotiating group on marine scientific research. They proved very difficult.

The basic difference centered on whether, as proposed in a document reintroduced with only minor changes on behalf of the Group of 77,<sup>97</sup> such research should be subject to coastal state consent or, as proposed by other countries, including developed and developing landlocked and geographically disadvantaged countries,<sup>98</sup> such research should be subject to certain obligations to the coastal state, including notification, participation, and data sharing, with preliminary dispute-settlement procedures to ensure fulfillment of the obligations prior to undertaking the research project. The view of the United States was that the conditions for scientific research should be agreed in the treaty and subject to compulsory dispute settlement in order to protect the interests of the coastal state and the international community and that this obviates the need for and dangers of consent. Moreover, the fact that drilling for all purposes on the continental shelf would be controlled exclusively by the coastal state<sup>99</sup> meets the major arguments for a consent regime.

Early in the session, the U.S.S.R. and other Socialist countries introduced a formal proposal that would require coastal state consent for research "related to the exploration and exploitation of living and non-living resources," while other scientific research would be subject to a series of treaty obligations.<sup>100</sup> The idea of distinguishing between types of research thereafter dominated the discussions. Needless to say, supporters and opponents of a consent regime noted the difficulties of making such distinctions but were aware of the potential for accommodation in such an

<sup>92</sup> SNT, PART III, Protection and Preservation of the Marine Environment. Article 44 provides:

Any dispute with respect to the interpretation or application of the provisions of this Convention with respect to the preservation of the marine environment shall be resolved by the dispute settlement procedures contained in Chapter — of this Convention.

<sup>93</sup> *Id.*, Art. 41.

<sup>94</sup> *Id.*, Art. 42.

<sup>95</sup> *Id.*, Art. 43.

<sup>96</sup> *Id.*, Art. 44, note 92 *supra*.

<sup>97</sup> A/CONF.62/C.3/L.13/Rev.1, April 4, 1975; Rev. 2, April 21, 1975; see the earlier Caracas text, A/CONF.62/C.3/L.13, discussed by the authors at 69 AJIL 28 (1975).

<sup>98</sup> A/CONF.62/C.3/L.28, April 24, 1975, amending the Caracas text, A/CONF.62/C.3/L.19, discussed by the authors at 69 AJIL 28 (1975).

<sup>99</sup> SNT, PART II, Art. 67.

<sup>100</sup> A/CONF.62/C.3/L.26, April 3, 1975.

idea. In the closing days of the session, and after prior consultation with others, Colombia, El Salvador, Mexico, and Nigeria introduced a proposal<sup>101</sup> which makes an analogous distinction between resource related research and fundamental scientific research.

The single negotiating text picks up this general approach. Scientific research in the economic zone or on the continental shelf would be subject to such requirements as notice to the coastal state, participation by the coastal state, provision of data and samples to the coastal state, assistance to the coastal state in assessing data, samples, and results, and international dissemination of results.<sup>102</sup> Landlocked and geographically disadvantaged states in the region would also receive notice and have a right to participate "whenever feasible."<sup>103</sup>

The notice to the coastal state must state whether the research project is "of a fundamental nature or related to the resources of the economic zone or continental shelf."<sup>104</sup> If the project is related to such resources, it is subject to coastal state consent and additional conditions, including a duty to "ensure that the research results are not published or made internationally available without the express consent of the coastal state."<sup>105</sup> While this provision reflects the extreme sensitivities of some coastal states on the issue, the facile assimilation of scientific research regarding resources to commercial exploration is open to question. It is difficult to see what, if any, conceivable harm to a state which controls all exploitation could justify this obvious impediment to the acquisition and open dissemination of knowledge about the oceans. An essential element of progress in understanding natural features and processes is comparison; this requires the broadest possible data base.

Disagreements regarding the question whether research is fundamental are subject to relevant compulsory dispute-settlement procedures specified elsewhere in the Convention.<sup>106</sup> There is also a general cross-reference to the dispute settlement Chapter.<sup>107</sup>

The remaining provisions on marine scientific research deal with the right to conduct scientific research beyond the economic zone and continental shelf,<sup>108</sup> scientific research installations and equipment,<sup>109</sup> and responsibility and liability.<sup>110</sup>

### 3. *Development and Transfer of Technology*

The general provisions on development and transfer of technology establish a duty to cooperate in actively promoting "the development and trans-

<sup>101</sup> A/CONF.62/C.3/L.29, May 6, 1975.

<sup>102</sup> SNT, PART III, Marine Scientific Research, Arts. 15-17, 22.

<sup>103</sup> *Id.*, Art. 23.

<sup>104</sup> *Id.*, Art. 18.

<sup>105</sup> *Id.*, Art. 21.

<sup>106</sup> *Id.*, Art. 20.

<sup>107</sup> *Id.*, Art. 37.

<sup>108</sup> *Id.*, Arts. 25, 26; *see* SNT, PART I, Art. 10; PART II, Art. 75.

<sup>109</sup> *Id.*, Arts. 27-33; *see* SNT, PART II, Arts. 48, 66, 75.

<sup>110</sup> *Id.*, Arts. 34-36.



fer of marine sciences and marine technology at fair and reasonable terms.”<sup>111</sup> Specific reference is made to the development of the marine scientific and technological capacity of developing states.<sup>112</sup> Specific duties are imposed on all states to “promote the acquisition, evolution and dissemination of marine scientific and technological knowledge,” “promote training and education,” especially of developing country nationals, and “facilitate access to scientific and technological information and data.”<sup>113</sup> The chapter on international cooperation calls, among other things, for states to “promote the establishment of universally accepted guidelines” for the transfer of marine technology.<sup>114</sup>

With respect to the international seabed area, the international Authority would be required to ensure, *inter alia*, that developing country nationals “be taken on under training as members of the managerial, research and technical staff constituted for its undertakings,” and would be called upon to conduct other training and dissemination of information.<sup>115</sup> The Committee I text itself deals with transfer of technology and participation of developing countries in activities in the deep seabed area.<sup>116</sup> The extent to which developing country positions in Committee I are in fact motivated by the desire to use the international seabed Authority as a vehicle for increased participation and training in the development and use of advanced and highly sophisticated marine technology is unclear. It could of course be quite relevant to the more industrialized of those countries, but would not seem very relevant to the development needs and priorities of the less developed or, indeed, the wealthier but as yet unindustrialized states in that group.

#### SETTLEMENT OF DISPUTES

The single negotiating text on settlement of disputes “is based to a considerable extent on the work of the Informal Group on the Settlement of Disputes,” and “seeks to blend . . . the essence of the various alternatives” presented.<sup>117</sup> While not official, the Group was open to all Conference participants, was attended at one time or another by representatives from more than 60 countries, and held announced regular meetings. The Co-Chairmen of the Group consulted informally with the President of the Conference and the Chairmen of the Main Committees on its work.

Some states, including the United States, have publicly stated that agreement on compulsory dispute settlement is an essential element of an overall “package.” There is no reason to believe their position on this issue will change. There is simply too much room in the treaty for misunderstanding, abuse of power, and interference with rights on the basis of unilateral interpretation.

<sup>111</sup> SNT, PART III, Development and Transfer of Technology, Art. 1.

<sup>112</sup> *Ibid.*

<sup>113</sup> *Id.*, Art. 3.

<sup>114</sup> *Id.*, Art. 6.

<sup>115</sup> *Id.*, Art. 9.

<sup>116</sup> SNT, PART I, Arts. 11, 18; Annex I, paras. 8(b), 10(b), 12(11).

<sup>117</sup> Note 3, *supra*.

Since this issue of the *Journal* fortunately contains an analysis of the dispute settlement issues and texts by Mr. A. O. Adede, one of the Co-Chairmen of the Dispute Settlement Group,<sup>118</sup> the authors will confine themselves to a comment on one of the main issues.

Attempts were made at Geneva to exclude the economic zone as a whole from compulsory dispute settlement. These attempts were strongly, widely, and properly resisted. This resistance came from states, like the United States, that supported provisions protecting the exercise of resource management discretion by the coastal state in accordance with the Convention.<sup>119</sup> It is no accident that proponents of a 200-mile territorial sea or its equivalent were among the active proponents of excluding the economic zone from dispute settlement. The essential issue is an accommodation that guarantees not only coastal, but international, rights in the 200-mile economic zone. If it is the perception of the "territorialists" that an economic zone without compulsory dispute settlement will evolve into a territorial sea, that may also be the perception and the concern of those who have major interests in the protection of navigational and other freedoms.

This is not a peripheral or procedural issue; it is substantive. If states cannot resort to international adjudicatory procedures to protect their rights, they are ultimately faced with the same problems arising from unilateral treaty interpretation that arise from unilateral claims. If their own interests are not adequately protected, what then is the incentive for states to accept a treaty that will inevitably contain rules designed to accommodate interests they do not share?

Most states have far greater interests in protecting navigation than in protecting fishing in the economic zones of other states. Without minimizing the importance of compulsory dispute settlement to fishing issues, it would be foolhardy to expect the majority of coastal states to accept compulsory dispute settlement with respect to fishing that was not part of a broader compulsory dispute settlement system which includes navigation. In this sense, the debate over general and functional approaches to dispute settlement, discussed by Mr. Adede, has assumed dangerous dimensions. The question of the type of forum or forums to be used for settling disputes is not all that difficult to resolve;<sup>120</sup> but the debate is obscuring the broader

<sup>118</sup> See A. O. Adede, *Settlement of Disputes Arising under the Law of the Sea Convention*, *infra* p. 798.

<sup>119</sup> See SNT (Settlement of Disputes) Art. 18; Working Paper on Settlement of Disputes, Annex I, Art. 17, note 3 *supra*.

<sup>120</sup> The question of forum is one basic difference between the general approach to dispute settlement in Annex I and the functional approach in Annex II of the Working Paper of the Dispute Settlement Group. In an attempt to accommodate differences on this matter, Article 6 of the single negotiating text gives preference to special (that is functional) procedures where the treaty provides for such procedures, and Article 9 provides that if both parties to the dispute have previously declared that they accept the jurisdiction of an arbitral tribunal, or the International Court of Justice, then "either party may submit the dispute to that tribunal" rather than to the new Law of the Sea Tribunal.

issue of acceptance of binding third-party dispute settlement in the economic zone, a matter vital to the success of the Conference.

#### CONCLUSION

Aspirations for successful completion of the Conference have not been met in 1975. It remains unclear whether these aspirations will be met in 1976. This depends in part on whether there is sufficient political will to make the additional accommodations necessary for success, and whether adequate time is provided for both informal work and Conference sessions. One eight-week Conference session is almost certainly not enough.

The central procedural manifestation of progress toward a widely acceptable treaty is likely to be the approach taken to the single negotiating texts. If the Conference is beset by a plethora of amendments from individual states or groups on which it is compelled to take formal action, the chances for its early and successful completion will be reduced. There are simply too many points, some seemingly minor, where isolated decisions could preclude general agreement. On the other hand, if there is a frank and realistic assessment of the extent to which the texts do not reflect an adequate basis for widespread agreement and intensive negotiation designed to resolve the problems by widely agreed amendments, the chances for success are substantial.

# SETTLEMENT OF DISPUTES ARISING UNDER THE LAW OF THE SEA CONVENTION

By A. O. Adede \*

## I.

### INTRODUCTION

The basic objective of the Third United Nations Conference on the Law of the Sea is to adopt a comprehensive Law of the Sea Convention. From the records of the long preparatory work of the Conference by the UN Seabed Committee<sup>1</sup> and the discussions at both the Caracas and Geneva sessions of the Conference,<sup>2</sup> it is clear that the final product will be a treaty creating new rules of international law and also updating certain traditional ones. In effect, the comprehensive Law of the Sea Convention is intended to establish a new world order in the ocean space.

The establishment of an effective system for the settlement of disputes arising out of the Convention should be regarded as one of the pillars of the new world order in the ocean space itself.

There are certain fundamental issues which must be mentioned at the outset. The first one is whether or not states will indeed agree to include in the Law of the Sea Convention a system of third-party settlement with compulsory jurisdiction. The second is whether states will agree to submit to such compulsory procedures *all* disputes or only a limited category of cases. This issue is related to the question of reservations to the chapter on the settlement of disputes itself. The attitude of states on this issue will be reflected in the decision whether the chapter on dispute settlement is to be an integral part of the Law of the Sea Convention itself or an optional protocol to the Convention.

The purpose of this article is, therefore, to explore the prospects for the establishment, within the Law of the Sea Convention, of a system that would encourage all the actors in the new world order of the oceans to settle their disputes peacefully. The mechanism contemplated here is one that would allow states flexible choices of modes of settlement ranging from the most informal, noncompulsory procedures with nonbinding deci-

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<sup>1</sup> For an analytical report of the preparatory work of the UN Seabed Committee see Stevenson and Oxman, *The Preparations for the Law of the Sea Conference*, 68 AJIL 1 (1974).

<sup>2</sup> For a comprehensive analysis of the work of the Caracas session of the Law of the Sea Conference, see Stevenson and Oxman, 69 AJIL 1 (1975). The work of the Geneva session is analyzed by the same authors at *supra* p. 763.

sions to the most formal and compulsory settlement procedures entailing binding decisions. Under this scheme, the parties to the dispute will be free to choose, by agreement, any method of dispute settlement which they consider suitable. Such methods include: direct negotiation, good offices, mediation, conciliation, arbitration, judicial settlement,<sup>3</sup> or special procedures provided for in the constitution of an international organization, either general or regional.

One possibility is a functional system in which special settlement procedures with binding decisions are to be established for the settlement of disputes arising out of various chapters of the Convention. For example, there would be procedures established to settle technical and scientific disputes arising from the fisheries, pollution, scientific research, and transfer of technology chapters of the Convention. It is also under this functional approach that the creation of a special Seabed Tribunal dealing with disputes arising from activities in the international seabed area is envisaged.<sup>4</sup> The decisions made by such special compulsory procedures are to be final and without appeal.

The second possible approach is a comprehensive or general one which contemplates the establishment of a Law of the Sea Tribunal, the use of the International Court of Justice, or the establishment of an *ad hoc* arbitral tribunal. The comprehensive approach is intended also to take into account special procedures under the functional system. The comprehensive approach relies on a two-step procedure. While allowing for special procedures under the functional approach, the comprehensive system provides that decisions made on functional lines may be subject to appeal before any of the three tribunals listed above which has been given jurisdiction over the dispute by the parties. For example, where a decision is made under a special procedure by a commission or an arbitral tribunal on a dispute relating to a particular chapter of the Convention, an appeal would be allowed but only if the decision under the special procedure is challenged on specific grounds to be enumerated in the Convention itself.

Apart from their limited appellate jurisdiction, the three tribunals envisaged under the comprehensive approach may also have primary, secondary, and special jurisdictions on any category of disputes for which the Convention does not provide special procedures. In settling a dispute referred to them, the three tribunals contemplated under the comprehensive approach may rely upon experts and assessors on technical matters.

The Group on the Settlement of Disputes, the work of which is discussed below, has attempted to formulate treaty articles characterized by a maxi-

<sup>3</sup> A useful discussion on these methods of settlement of disputes is found in, e.g., Sohn, *The Relation of Arbitration to other Methods of Settling International Disputes*, 108 REC. DES COURS 11 (1963-1).

<sup>4</sup> Early proposals and discussions on the settlement of disputes by the Seabed Committee related only to the activities in the seabed area beyond the limits of national jurisdiction. For a summary and analysis of the early proposal for a Seabed Tribunal see Sohn, *A Tribunal for the Sea-Bed or the Oceans*, 32 ZEITSCHRIFT FÜR AUSLÄNDISCHES ÖFFENTLICHES RECHT UND VÖLKERRECHT 253 (1972).

imum flexibility of approach, with the sole aim of suggesting an effective and viable system for the settlement of law of the sea disputes. The draft treaty articles analyzed below show how the Group adopted the comprehensive system while also providing for special procedures on functional lines.

## II.

### THE WORK OF THE GROUP ON THE SETTLEMENT OF LAW OF THE SEA DISPUTES

The Informal Working Group on the Settlement of Disputes arising from the Law of the Sea Convention was first convened at the Caracas session of the Conference at the initiative of the Delegation of the United States.<sup>5</sup> As its initial basis for commencing discussions on the subject, the Working Group had before it the proposal on the settlement of disputes which was submitted by United States to the UN Seabed Committee.<sup>6</sup> In the course of the preliminary discussions, the Group proceeded independently of the United States draft and, on the basis of a questionnaire distributed to the participating states, prepared alternative provisions on the following subjects:

- (1) Obligation to settle disputes under the Convention by peaceful means.
- (2) Settlement of disputes by means chosen by the parties.
- (3) Clause relating to other obligations with respect to dispute settlement.
- (4) Clause relating to settlement procedures entailing binding decisions.
- (5) Obligation to resort to a means of settlement resulting in a binding decision.
- (6) The relationship between the general and functional approaches.
- (7) Parties to the dispute.
- (8) Local remedies rule.
- (9) Advisory jurisdiction.
- (10) Law applicable.
- (11) Exceptions and reservations to the dispute settlement provisions.

<sup>5</sup> The Working Group elected as Co-Chairmen, Ambassadors R. Galindo Pohl (El Salvador) and R. L. Harry (Australia). When Ambassador Galindo Pohl became Chairman of Committee II at the Geneva session of the Conference, the Working Group elected Dr. A. O. Adede (Kenya) as Co-Chairman. Professor Louis B. Sohn (U.S.A.) has acted as Rapporteur, both at the Caracas session and Geneva session of the Working Group. Since the Working Group does not keep official records of its meetings, the author of this article has relied on his own notes and also on the unofficial minutes of the Geneva proceedings which were diligently prepared by Mr. F. P. Nolan of the Australian Delegation.

<sup>6</sup> United States, Draft Articles for a Chapter on the Settlement of Disputes, UN Doc. A/AC.138/97 (1973). Reproduced in 28 UN GAOR Supp. 21, Vol. II, at 22-23, UN Doc. A/9021 (1973).

The alternative treaty provisions on the above subjects were included in a Working Paper which was officially submitted to the Conference on the last day of the Caracas session.<sup>7</sup> The purpose was to allow governments the opportunity to study the proposal and to focus attention on this very important aspect of the Law of the Sea Convention. In the view of certain delegations, the establishment of an effective system for the settlement of disputes is part of the treaty package itself. Thus, certain treaty texts are being prepared by the three Main Committees, the acceptability of which depends, to a large extent, upon the expectation of the establishment of an effective disputes-settlement procedure.

The Working Group had before it, at the Geneva session, the Caracas document containing alternative texts for all the eleven subjects listed above. The aim of the Working Group was to produce at Geneva a single informal text without alternatives for the consideration of the Conference as a whole. The Working Group submitted to the Conference a document which contained seventeen draft articles with several sub-annexes.<sup>8</sup>

The seventeen draft articles prepared by the Working Group may be analyzed in a series of groups so as to point out important trends of thought reflected in their formulation.

#### *Draft Articles which Offer Wide Choices of Modes of Settlement*

The first series of the draft articles discussed here are those which are aimed at giving states complete freedom to choose whichever means of settlement is considered suitable by them in a particular case. The seven draft articles the texts of which are set out below illustrate the attempt made by the Working Group to maintain an appreciable degree of flexibility in the settlement system being created. As will become evident, each of the seven articles also stands on its own for an important aspect of the dispute-settlement procedures.

#### **Article 1**

The Contracting Party shall settle any disputes between them relating to the interpretation or application of this Convention through

<sup>7</sup> The paper was submitted as UN Doc. A/CONF.62/L.7; reproduced in *THIRD UN CONF. ON THE LAW OF THE SEA, OFF. RECS*, Vol. III, at 55-93 (1974). For a useful analysis of this Caracas document on the settlement of disputes, see Spohn, *Settlement of Disputes Arising out of the Law of the Sea Convention*, 12 *SAN DIEGO L. REV.* 495 (1975).

<sup>8</sup> See UN Doc. SD.Gp/2nd Sess./No. 1/Rev. 5, May 1, 1975. Reprinted in 14 *ILM* 762 (1975). As finally presented, the document has three main annexes. The 17 draft articles are divided into two categories: opening draft Articles 1-4, followed by draft Articles 5-17 as annex I with the three sub-annexes: Annex IA on conciliation; Annex IB on Arbitration; and Annex IC containing the draft Statute of the Law of the Sea Tribunal. Annex II illustrates the functional approach to the settlement of disputes and was submitted by Professor J. P. Queneudec of France. Annex III is a preliminary Chapter on Information and Consultation submitted by the Australian Delegation. [*Ed. Note:* Subsequent to the writing of this article, the President of the Conference prepared and circulated an Informal Single Negotiating Text on Settlement of Disputes. See UN Doc. A/CONF.62/WP.9, July 21, 1975.]

the peaceful means indicated in Article 33 of the Charter of the United Nations.<sup>9</sup>

### Article 2

Nothing in this Chapter shall impair the right of the Contracting Parties to agree at any time to settle a dispute between them which relates to the interpretation or application of this Convention by any peaceful means of their own choice.

### Article 3

If the Contracting Parties which are parties to a dispute relating to the interpretation or application of this Convention have accepted, through a general, regional or special agreement, or some other instruments, an obligation to resort to arbitration or judicial settlement, any party to the dispute may refer it to arbitration or judicial settlement in accordance with such agreement or instruments in place of the procedure specified in this Chapter, unless the parties agree otherwise.

### Article 4

1. If a dispute arises between two or more Contracting Parties with respect to the interpretation or application of this Convention, those Parties shall proceed expeditiously to exchange views regarding settlement of the dispute.

2. Similarly, such an exchange of views shall be held whenever a procedure under this Convention, or another procedure chosen by the parties, has been terminated without a settlement of the dispute.

### Article 5

If the Contracting Parties which are parties to a dispute have agreed to settle a dispute by a peaceful means of their own choice and have agreed on a time limit for such proceedings, the procedure specified in this Chapter shall apply only after the expiration of that time limit, provided that no settlement has been reached and the agreement between the parties does not preclude any further procedure.

### Article 6

Where a chapter of this Convention provides a special procedure for settling all or some disputes relating to the interpretation or application of that chapter, the procedure specified in this Chapter shall apply only after that special procedure has been concluded, provided that no settlement has been reached and the relevant chapter does not preclude any further procedure.

### Article 7

1. Where no special procedure is provided for in other chapters of this Convention, any Contracting Party which is party to a dispute

<sup>9</sup> The Working Group recommended that the Conference consider the desirability of including the following phrase in the preamble to the Convention: "Having regard to the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations . . ." [Footnote to the text of this article as contained in the document cited *supra* note 8, at 4.]



relating to the interpretation or application of this Convention may invite the other party or parties to the dispute to submit the dispute to conciliation in accordance with Annex IA.

2. If the other party accepts this invitation, the conciliation procedure shall proceed in accordance with Annex IA, subject to paragraph 3 below.

3. If a party to the dispute does not accept the invitation, or after accepting the invitation refuses to appoint its members of the conciliation commission or the chairman thereof, the party which has initiated the proceedings may terminate the proceedings by notifying the other party or parties to the dispute to this effect.

4. If the conciliation procedure is terminated in accordance with the preceding paragraph, or the dispute is not settled by conciliation, either party to the dispute may resort to the procedure specified in this Chapter.

Draft Article 1 above states the basic minimum requirement, which emphasizes that disputes should be settled through the peaceful means indicated in Article 33 of the Charter of the United Nations, namely, negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement, resort to regional agencies or arrangements, or other peaceful means of the parties' choice.

Draft Article 2 then merely seeks to make it absolutely clear that parties to a dispute are indeed free to settle their dispute by peaceful means of their own choice, a right which is incorporated in draft Article 1 by reference to Article 33 of the UN Charter. The right of parties to settle their dispute by peaceful means of their own choice is further recognized in draft Article 3. As can be seen from the text, if the parties to a dispute have agreed to settle such a dispute through a certain form of settlement established by a prior agreement, that prior agreement is to be observed and the dispute is to be settled accordingly.

Draft Article 4 deals with a very important concept in this scheme which allows a wide choice of modes of settlement. The draft article establishes that there should not be *automatic* transfer from one settlement procedure to another when the first attempt has failed. This is important in the situation wherein a procedure with no binding decision was first tried without success and the aggrieved party wants to proceed to a settlement procedure entailing a binding decision. Article 4 therefore ensures that the settlement of disputes through a compulsory procedure under this system is not an automatic process. The parties are still required to exchange views on the possible settlement procedure if their first attempts have terminated without settling the dispute in question.

Draft Articles 5 and 6 contain provisions giving latitude to the prior arrangements of parties to a dispute in the same manner as draft Article 3. Draft Article 5 gives effect to the applicable time limit in the settlement through means of the parties' own choice and establishes a condition for the applicability of the procedures provided for under the proposed comprehensive system.

Draft Article 6, on the other hand, envisages clearly that the Law of the Sea Convention as a whole may have chapters in which special procedures are stipulated for the settlement of disputes relating to the interpretation and application of those chapters. In such a case the settlement procedures provided for in the comprehensive system may apply only when the specialized procedures under a specific chapter have provided no settlement and where the relevant chapter does not preclude any further procedure. Here is the first indication that these draft articles do take full account of the functional approach to the settlement of disputes under the Law of the Sea Convention, while providing an opening for further mechanisms when the specialized procedures under the functional approach have failed to bring about a settlement.

Draft Article 7, the last one in this series, is also of special importance. Like draft Article 6, it contemplates the existence of special procedures in the various chapters of the Convention. Where no such special procedures are provided for in a chapter, Article 7 calls upon the parties to the dispute to settle such a dispute by means of conciliation. It should be emphasized here that settlement of disputes through conciliation is given a special place in the proposed system as a deliberate attempt to encourage states to settle their disputes through such informal procedures instead of relying always upon costly judicial settlement. The Working Group had occasion to consider a special paper which emphasized the need for dispute avoidance as opposed to dispute settlement.<sup>10</sup> One way of minimizing the occurrence of disputes between the parties is to provide for making available relevant information and encouraging prompt responses to requests for such information so as to allow for the necessary consultation between the parties.<sup>11</sup>

<sup>10</sup> The paper was submitted by Mr. E. Lauterpacht on behalf of the Australian Delegation. The central thesis of the paper is contained in the following excerpt:

The Australian Delegation is influenced in this inquiry by the following considerations:

(i) the obvious desirability of preventing "differences" escalating into "disputes";

(ii) the fact that there are a number of problems in relation to the law of the sea which are better solved other than on a basis of strict law or, indeed, cannot by their nature be solved on such a basis;

(iii) realization that extensive rights for States in relation to the economic zone, archipelagic waters and straits may be the more acceptable if associated with techniques for reviewing the exercise of regulatory powers; and

(iv) awareness that even the judgment of a court is ultimately dependent for its effective fulfillment upon the consent of the State against which it is given; and that the reasons which lead States to comply with judgments ought to be brought to bear in such a way as to secure at an earlier stage the same willingness to settle disputes.

From Settlement of Disputes, Australian Paper (Mar. 21, 1975).

<sup>11</sup> Consider further the Australian elaboration of the scheme explained in note 10 above. Two suggestions of a procedural character which the Australian paper identified as novel with respect to the scheme were expressed as follows:

The first is that at even as early a stage as consultation the parties should be obliged to exchange in writing full statement of their respective positions, setting out the facts and all relevant considerations, of law and otherwise. This is because experience has shown that disputes have often festered for a prolonged period because neither side was aware until too late of the full nature of its own

According to Article 7, therefore, the procedures for settlement entailing binding decisions may be invoked by a party ordinarily only when the conciliation procedure has failed to settle the dispute. Draft Article 7 may be said to provide the link between the informal nonbinding procedures and the compulsory procedures which are analyzed next.

*Draft Articles Concerning Procedures Entailing Binding Decisions—Compulsory Jurisdiction*

In the next series of four articles, the Working Group attempted to maintain flexibility of choice with regard to the fora with compulsory jurisdiction and also to define the precise scope and competence of the various tribunals stipulated. The order in which the tribunals are listed under draft Article 9 below does not imply preference and their stipulation is without prejudice to the position of any state vis-à-vis the suitability of any one of the tribunals in the settlement system being created.

**Article 8**

1. Subject to the preceding provisions of this Chapter, any dispute relating to the interpretation or application of this Convention which has not been settled in accordance with those provisions shall be settled in accordance with the provisions of Articles 10 and 11 of this Chapter. Any such dispute may be submitted to the tribunal having jurisdiction under these Articles by application of any party to the dispute.

**Article 9**

1. In disputes relating to the interpretation or application of this Convention, the following tribunals shall have jurisdiction to the extent and in the manner provided for in this Chapter:

- (a) An arbitral tribunal constituted in accordance with Annex IB.
- (b) The Law of the Sea Tribunal constituted in accordance with Annex IC.
- (c) The International Court of Justice.

2. The jurisdiction of these tribunals with respect to a Contracting Party shall be determined in accordance with the following provisions:

(a) A Contracting Party, when ratifying this Convention, or otherwise expressing its consent to be bound by this Convention, shall make a declaration that it accepts with respect to decisions to be made in accordance with Article 10 of this Chapter the jurisdiction of an arbitral tribunal, or the Law of the Sea Tribunal or the International Court of Justice, or any two or three of them.

(b) If a Contracting Party has not made such a declaration, it shall be subject to the jurisdiction of [an arbitral tribunal] [The Law of the Sea Tribunal].

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and the other party's position. The second new feature is the requirement that both in the conciliation and in the judicial settlement procedures, especially the latter, the parties should be required, after the close of the written pleadings and in the full knowledge of the strength and weakness of each other's case, once again to go through a phase of negotiation.

(c) A Contracting Party may also make or change a declaration at any time it becomes bound by this Convention. Any such declaration or change shall not affect any proceeding already pending before a tribunal having jurisdiction under this Article.

(d) Unless the parties agree otherwise, any case against a Contracting Party can be submitted only to the tribunal the jurisdiction of which has been accepted by that Party at the time the proceedings are being instituted.

### Article 10

1. Subject to provisions of Articles 1 to 9 of this Chapter, the tribunal which has jurisdiction over a Contracting Party under Article 9 shall be entitled to exercise its jurisdiction in the following instances:

(a) Primary jurisdiction over any dispute between Contracting Parties relating to the interpretation or application of this Convention for which no special procedure has been provided in another chapter of this Convention and in which no resort has been made to conciliation procedure under Article 7 of this Chapter.

(b) Secondary jurisdiction over any dispute between Contracting Parties relating to the interpretation or application of this Convention which has not been settled by conciliation procedure under Article 7 of this Chapter or to a special procedure provided for in another chapter of this Convention unless that chapter expressly excludes further procedure under this Chapter.

(c) Appellate jurisdiction, limited to cases specified in paragraph 4 of this Article, over any dispute between Contracting Parties relating to the interpretation or application of this Convention in which a binding decision has been rendered as a result of resort to a special procedure provided for in another chapter of this Convention and in which an appellate procedure is not expressly excluded.

(d) Special jurisdiction over any dispute arising under a clause in this Convention, in the rules or regulations enacted thereunder, or in an agreement or arrangement concluded pursuant to this Convention or related to the purposes of this Convention, which expressly provides that a particular category of disputes be settled in accordance with the procedure specified in this Chapter.

2. The jurisdiction under paragraph (a) of this Article may not be exercised:

(a) If another chapter of this Convention expressly excludes such jurisdiction with respect to any dispute relating to that chapter; or

(b) If another chapter of this Convention provides that any dispute relating to that chapter shall be dealt with in accordance with a specified annex to this Chapter.

3. In any case submitted under paragraph 1(b) of this Article, the findings of fact made in accordance with a special procedure provided for in another chapter of this Convention shall be considered conclusive unless one of the parties presents positive proof that a gross error has been committed.

4. The jurisdiction under paragraph 1(c) of this Article may be exercised only when one of the parties to the dispute presents a claim that the decision rendered under another chapter of this Convention was invalid because of:

- (a) lack of jurisdiction;
- (b) infringement of basic procedural rules;
- (c) abuse or misuse of power; or
- (d) gross violation of this Convention.

5. A claim under paragraph 4 of this Article must be submitted within three months from the date of the contested decision.

### Article 11

1. When dealing with a dispute relating to chapters — of this Convention, the tribunal having jurisdiction under Articles 9 and 10 of this Chapter may, at the request of one or more of the parties or on its own initiative, either

(a) refer any scientific or technical matters to a committee of experts chosen from the list of qualified persons prepared in accordance with Annex —; or

(b) select four technical assessors from the list mentioned in the preceding subparagraph, who shall sit with the tribunal throughout all the stages of the proceedings, but without the right to vote.

2. In a case referred to a committee of experts under subparagraph 1(a) of this Article, if the dispute is not settled on the basis of the committee's opinion, either party to the dispute may request that the tribunal proceed to consider the other aspects of the dispute, taking into consideration the findings of the committee and other pertinent information.

When a dispute has not been settled through any of the means specified in draft Articles 1 to 7, the present draft Article 8 opens the way for such a dispute to be settled through the compulsory procedure provided for in draft Articles 9 and 10. Here again the question of *automatic* reference to a compulsory procedure arises. The point is that, whenever any procedure fails to settle a dispute between the parties, those parties are required under draft Article 4 to exchange views regarding the settlement of the dispute. Thus, at the end of the procedures provided for in Articles 1 to 7, when no settlement is achieved, Article 4 comes into play again. Then the compulsory procedures may be invoked if no other means seems appropriate.

Draft Article 9 then offers states a variety of tribunals where such compulsory proceedings may be instituted against a state. In this instance also the Working Paper has attempted to maintain flexibility where such flexibility is necessary. Paragraph 1 of Article 9 gives a state the option to choose (a) an arbitral tribunal, (b) the Law of the Sea Tribunal,<sup>12</sup> or (c)

<sup>12</sup> The salient features of the Law of the Sea Tribunal are reflected in the following article of its Draft Statute:

### Article 16

1. The Tribunal shall frame rules for carrying out its functions. In particular, it shall lay down rules of procedure.

2. When a dispute involves technical questions, such as safety of navigation, ship construction, pollution, scientific research, fishing, or seabed exploration or

the International Court of Justice. This choice, as mentioned earlier, protects a state which does not like one or two of the three tribunals. So, paragraph 2 of draft Article 9 requires a state to make a declaration specifying which of the three jurisdictions it prefers. An option is further left for a state which has made a declaration under subparagraph 2(a), specifying a forum, to change its preference so long as such a change remains without effect upon any proceeding already pending before a tribunal originally specified by the party. A compulsory proceeding can be brought against a state only before a tribunal which that state has accepted. Draft Article 9 encourages a states to make a specific declaration, because failure to do so would mean that such a state could be sued either before an arbitral tribunal or the Law of the Sea Tribunal. (The final choice between these two jurisdictions is left open in draft Article 10.)

Draft Article 10 then stipulates the scope and the competence of the tribunals listed under draft Article 9. Paragraphs 2(a) and (b) of draft Article 10 constitute another clear indication that the system of settlement contained in the Working Document takes into account the functional approach. Subparagraph 2(a) stipulates that compulsory proceedings shall not be brought against any state under the jurisdiction of any of the tribunals specified in draft Article 9, if another chapter of the Convention expressly excludes such a jurisdiction with respect to any dispute relating to that chapter. This provision allows room for settlement through special procedures under a chapter of the Convention which is subject to the functional approach. Such a special procedure may also be one of those provided for in a specific annex to the chapter on the settlement of disputes. In sum, draft Article 10 does not prejudice settlement procedures on functional lines. But where procedures on functional lines render decisions which one party wants to challenge, draft Article 10 provides for such an appellate procedure through the tribunals listed in draft Article 9. Nevertheless, the grounds for which an appeal may be had against decision rendered by special procedures are limited to the four specific instances enumerated in paragraph 4 of Article 10.

In exercising their jurisdiction properly conferred under draft Articles 9 and 10, the tribunals may rely upon experts on technical matters. This is provided for in draft Article 11 above. Taken together, therefore, draft

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exploitation, the Tribunal, or the chamber dealing with the dispute, shall be assisted in consideration of the case by two or more technical assessors sitting with it but without the right to vote. These assessors shall be chosen by the President of the Tribunal from the list of qualified persons prepared pursuant to the Rules of the Tribunal.

3. The Tribunal shall, whenever it deems it desirable or the parties to a case request it, refer technical issues of fact to a fact-finding board for non-binding advice. The members of such a board shall be selected from the list provided for in paragraph 2 of this Article.

Draft Article 14 of the Statute empowers the Tribunal to form one or more chambers for dealing with particular cases, while draft Article 15 provides that the Tribunal be constituted with a view to speedy dispatch of its business. For the competence of the Tribunal, see the text at *infra* note 28.

Articles 9, 10, and 11 constitute a compulsory procedure system with appreciable flexibility of choice with regard to such procedures, while at the same time ensuring that binding decisions shall be given on both legal and technical issues.

*Draft Articles on Interim Measures and Accelerated Procedures in Special Cases*

The Working Group also considered situations in which interim measures may be taken to preserve the rights of parties to a dispute and also where accelerated procedures are necessary to secure the release of vessels detained in connection with a violation of the Law of the Sea Convention. Two draft articles are proposed as follows:

**Article 12**

1. Upon the request of any Contracting Party which is a party to a dispute, the tribunal to which a dispute has been submitted under Article 9 shall have the power, if it considers that circumstances so require and after giving the parties an opportunity to be heard, to prescribe provisional measures, consistent with the object and purpose of this Convention, which it considers appropriate for the preservation of the respective rights of the parties and for minimizing damage to any party pending final adjudication.

2. If in the course of a dispute settlement procedure commenced under this Convention an additional dispute shall arise between two or more Contracting Parties as to the need for provisional measures to preserve the respective rights of the parties to such a procedure, or as to the content or extent of such measures, and if the organ in charge of this procedure has not yet been constituted or does not have the power to prescribe such measures, the Law of the Sea Tribunal shall have jurisdiction to prescribe such measures. These measures shall remain in force until an organ dealing with the merits of the dispute, and having the power to prescribe provisional measures, decides otherwise.

3. Notice of any provisional measures prescribed under this Article shall be given forthwith to the parties to the dispute and to all Contracting Parties.

4. Any provisional measures prescribed under this Article or an annex to this Chapter shall be binding upon the parties to the dispute. In any case in which the International Court of Justice has jurisdiction under Article 9 of this Chapter, any provisional measures indicated by that Court shall be binding on the parties to the dispute.

\* \* \* \* \*

**Article 15**

1. In case of the detention by the authorities of a Contracting Party of a vessel flying the flag of another Contracting Party, or of its crew or passengers, in connexion with a violation of this Convention, the owner or operator of the vessel, or a member of the crew or a passenger of the vessel, shall have the right to bring the question of detention

before the Law of the Sea Tribunal in order to secure prompt release of the vessel or of its crew or passengers in accordance with the applicable provisions of this Convention, including the presentation of a bond, and without prejudice to the merits of any case against the vessel, or its crew or passengers.

2. The Statute of the Law of the Sea Tribunal shall provide for an accelerated procedure to deal with cases under the preceding paragraph.

3. The decision of the Tribunal that the vessel, or its crew or passengers be released shall be promptly complied with by the authorities of the Contracting Party concerned.<sup>13</sup>

The basic aim of Article 12 is to provide a procedure for the preservation of the respective rights of parties and for minimizing damage to any party pending final adjudication.<sup>14</sup> Before any of the tribunals indicated in draft Article 9 can consider such provisional measures, it must be demonstrated that the tribunal has *prima facie* jurisdiction over the subject matter of the dispute.<sup>15</sup> Paragraph 1 of Article 12 further stipulates that such interim measures can be prescribed only when the tribunal has given the parties the opportunity to be heard. This is to ensure that the provisional measures are not prejudicial to the immediate interests of any of the parties. When, however, a dispute arises as to the need for such provisional measures or as to the extent of the measures, and if the organ which is charged with this procedure has either no power to prescribe such measures or has not been constituted, paragraph 2 of Article 12 gives the power to prescribe such measures to one of the tribunals under Article 9. The provisional measures prescribed *provisionally* by the tribunal are to remain in force unless, on the merits of the case, the organ to which the main dispute has been submitted and which has the power to prescribe provisional measures

<sup>13</sup> "This article may be later located in some other chapter or chapters of this Convention." [Footnote to the text of the article as contained in the document *supra* note 8, at 5.]

<sup>14</sup> Article 26 of Annex 1C containing the draft statute for the proposed Law of the Sea Tribunal gives the tribunal the power to prescribe such interim measures as follows:

#### Article 26

1. The Tribunal shall have the power to prescribe, if it considers that circumstances so require, any provisional measures which ought to be taken to preserve the respective rights of the parties and to minimize damage to any party pending final adjudication.

2. If the Tribunal is not in session, the provisional measures shall be prescribed by the Chamber of Summary Procedure to be established under Article 15 of this Statute.

3. Notice of the measures prescribed by the Tribunal shall forthwith be given to the parties and to all Contracting Parties.

4. The interim measures prescribed by the Tribunal, or its chamber, shall be binding upon the parties.

<sup>15</sup> The question of prior demonstration of *prima facie* jurisdiction is a troublesome one in this context. It is arguable that the application of that principle may lead to further delays in the prescription of interim measures, if the issue of jurisdiction is also to be contested and resolved first.



renders a contrary decision. Paragraph 3 of the article contains an important provision on notification with regard to the provisional measures. Paragraph 4 then stipulates that such provisional measures having been taken under any of the procedures enumerated therein are binding upon the parties.

The application of draft Article 12 is relevant only if one of the parties to the dispute (*viz.*, the defendant) chooses, under draft Article 9, arbitration as a compulsory procedure instead of either the Law of the Sea Tribunal or the International Court of Justice. Thus, before an arbitral tribunal is constituted to deal with the merits of the dispute—and it is known that the constitution of an arbitral tribunal usually takes a long time—a procedure should exist for prescribing interim measures for the purposes earlier indicated.

Article 12 contemplates that the procedure for interim measures may be initiated only at the request of one of the parties to the dispute. Thus, the court itself may not initiate such a procedure *proprio motu*,<sup>16</sup> even if it considers that the circumstances so require.

Draft Article 15 on accelerated procedures also deals with a special issue. Its aim is that, although a Contracting Party or a person whose vessel is found to violate the Law of the Sea Convention must be held answerable and proceedings must be brought against it or him, procedures should be established for securing the prompt release of the detained vessel, crew, or passengers. The person concerned or the Contracting Party must post an appropriate bond with the court having jurisdiction of the case. Concern with accelerated procedures under these circumstances is justified so long as the competing rights and interests of the parties are fully protected. The idea of draft Article 15 may, therefore, find itself more appropriately expressed under some other chapter of the Law of the Sea Convention and not necessarily in this chapter on the settlement of disputes. The Working Paper takes note of this question of the placement of draft Article 15.

#### *The Question of Parties with Standing before the Tribunals under Draft Article 9 and the Issue of Applicable Law*

The Working Document addresses itself to the question of parties to the compulsory dispute procedure and the issue of the law applicable in such proceedings. Draft Articles 13 and 16 which respectively deal with the two issues read as follows:

#### Article 13

1. The tribunals specified in Article 9 of this chapter, shall be open to the Contracting Parties.

<sup>16</sup> An earlier version of this important draft article contained a formulation which left room for the court having jurisdiction and the power to prescribe such interim measures to act *proprio motu*, taking as an example the similar power of the International Court of Justice under Article 41 of the Statute of the Court and the Rules of Procedure of the Court.

2. The conditions under which these tribunals shall be open to other States, to territories participating as observers in the Third Law of the Sea Conference; to international intergovernmental organizations and, whenever so provided in this Convention, to natural and juridical persons, shall be laid down by the Contracting Parties at a meeting to be held as soon as possible after coming into force of this Convention.

3. The provisions of this Article shall be without prejudice to the access, specified in this Convention, to any special procedure provided for in other chapters of this Convention.

4. The relevant provisions of paragraph 2 of this Article shall not apply to the International Court of Justice as long as that court is not open to entities other than States.

\* \* \* \* \*

### Article 16

1. In any dispute submitted to the tribunal having jurisdiction under Articles 9 and 10 of this Chapter, the tribunal shall apply the law of this Convention and any other applicable law.

2. In any such dispute the tribunal shall ensure that the rule of law is observed in the interpretation and application of this Convention.

3. The provisions of this Chapter shall not prejudice the right of the parties to the dispute to agree that the dispute be settled *ex aequo et bono*.

Paragraph 1 of draft Article 13 establishes that the tribunals specified under draft Article 9 are to be open to states. Thus when a dispute is between two or more states, all three tribunals specified under draft Article 9 are open to such parties. Paragraph 2 of the draft article, however, also envisages that disputes may arise between states and the proposed Seabed Authority, between states and natural or juridical persons, and between two or more such natural or juridical persons. In light of the potential range of parties to disputes, paragraph 2 of draft Article 13 opens the way for later determination of the conditions under which individuals will be allowed standing before the International Court of Justice, the Law of the Sea Tribunal, or an arbitral tribunal.<sup>17</sup>

As observed elsewhere,<sup>18</sup> states have usually found it difficult to accept the idea of a dispute-settlement machinery resulting in binding decisions. They balk even more when it is suggested, as in draft Article 13, that such machinery should be opened also to other entities such as natural or juridical persons and international organizations. Draft Article 13 must therefore be seen as an expression of the willingness of states to take the necessary step of allowing individuals procedural rights under the Law of the Sea Convention.

<sup>17</sup> It is clear that, without drastic changes in the procedures, functions, and jurisdiction of the International Court of Justice, the Court cannot deal with all disputes arising under the Law of the Sea Convention. This is one of the reasons why the creation of another tribunal—a Law of the Sea Tribunal with broader jurisdiction—is worthy of support. The argument that the creation of a new tribunal would result in a plurality of jurisprudence does not seem persuasive.

<sup>18</sup> See Sohn, *supra* note 7, at 509.

Draft Article 16 tries to answer the question of the scope of the law to be applied by the tribunals when interpreting or applying the Convention. The article requires the tribunals to apply (a) the law of the Convention and (b) any applicable law. The "any applicable law" provision may be read to include rules and regulations promulgated in conformity with the Convention and regional arrangements and public or private contracts concluded pursuant to the Law of the Sea Convention. Parties are also free to allow a dispute to be settled *ex aequo et bono*. It is hoped that the dispute-settlement machinery will ensure that the Law of the Sea Convention is properly observed. Paragraph 2 of draft Article 16 above makes this clear.

*The Question of Reservations to the Compulsory Settlement Procedures—National Jurisdiction Issues*

Draft Article 17 of the Working Document addresses itself to one of the issues which was identified at the beginning of this article as fundamental. The issue is whether the compulsory settlement of disputes under the Law of the Sea Convention might be rendered meaningless by states through reservations to such procedures. The preliminary answer to this question is set forth in the following draft article:

**Article 17**

1. When ratifying this Convention, or otherwise expressing its consent to be bound by it, a State may declare that, with respect to any dispute arising out of the exercise by a coastal State of its exclusive jurisdiction under this Convention it limits its acceptance of some of the dispute settlement procedures specified in this Convention to those situations in which it is claimed that a coastal State has violated its obligations under this Convention by:

(a) interfering with the freedoms of navigation or overflight, or of the laying of submarine cables or pipelines or related rights and duties of other States;

(b) failing to have due regard to other rights and duties of other States under this Convention;

(c) not applying international standards or criteria established by this Convention or in accordance therewith; or

(d) abusing or misusing the rights conferred upon it by this Convention (*abus ou détournement de pouvoir*) to the disadvantage of another Contracting Party.

2. If one of the parties to a dispute has made such a declaration and if the parties to a dispute are not in agreement as to whether the dispute involves a violation of this Convention specified in the preceding paragraph, this preliminary question shall be submitted to decisions by the tribunal having jurisdiction under Articles 9 and 10 of this Convention.

3. Whether or not it has made a declaration under paragraph 1 of this Article, a State may declare, when ratifying this Convention, or otherwise expressing its consent to be bound by it, that it does not accept some [or all] of the procedures for the settlement of disputes specified in this Convention with respect to one or more of the following categories of disputes:

(a) Disputes arising out of the exercise of discretionary rights by a coastal State pursuant to its regulatory and enforcement jurisdiction under this Convention, except in cases involving an abuse of power.

(b) Disputes concerning sea boundary delimitations between adjacent States, or those involving historic bays or titles, provided that the State making such a declaration shall indicate therein a regional or other third-party procedure, [whether or not] entailing a binding decision, which it accepts for the settlement of these disputes.

(c) Disputes concerning military activities, including those by government vessels and aircraft engaged in non-commercial service, but law enforcement activities pursuant to this Convention shall not be considered military activities.

(d) Disputes or situations in respect of which the Security Council of the United Nations is exercising the functions assigned to it by the Charter of the United Nations, unless the Security Council has determined that specified proceedings under this Convention would not interfere with the exercise of such functions in a particular case.

(e) . . . . .  
(f) . . . . .

4. A Contracting Party, which has made a declaration under paragraphs 1 or 3 of this Article, may at any time withdraw all or part of its exceptions.

5. If one of the Contracting Parties has made a declaration under paragraphs 1 or 3 of this Article, any other Contracting Party may enforce the same exception in regard to the Party which made the declaration.<sup>19</sup>

The vigorous debate which occurred during the consideration of this article by the Working Group disclosed that there are three distinctive views on the fundamental issue. One view is that no reservations whatsoever should be permitted. The second view is that reservations may be allowed but only with respect to a limited category of cases. The third view, on the other hand, emphasizes recognition of the sovereign rights of coastal states and, accordingly, seeks to exclude from compulsory procedures any dispute relating to a matter which falls within the national jurisdiction of a coastal state.<sup>20</sup>

<sup>19</sup> "The precise drafting and implications of this Article, in particular of paragraph 3 (a), will require further examination in the light of the substantive provisions of this Convention." [Footnote to this article as contained in the document *supra* note 8, at 6.]

<sup>20</sup> The third view is contained, for example, in the paper submitted to the Working Group by Professor Andrés Aramburú of Peru, suggesting the following text for Article 17:

When ratifying the present Convention or expressing in another manner its consent to be considered as bound under this Convention, any State will be entitled to declare that it does not accept any of the proceedings for the solution of controversies, specifically provided for in this Convention, to be applied to those raised as a consequence of events that took place in areas subject to its sovereignty and/or jurisdiction, such as the territorial sea, the exclusive economic zone or the continental shelf, or having connection with such areas, including those referring to the boundaries or the extension of such areas and to the resources, living or not living, existing in the same, and that such controversies will belong to the exclusive competence of the jurisdictional bodies of the coastal State.

[Unofficial translation: not checked for accuracy]

The draft article attempts to accommodate the second view by enumerating under paragraph 3 the categories of cases which could be excluded from the compulsory procedures by a Contracting Party to the Law of the Sea Convention. Paragraph 3(a) constitutes a special attempt to accommodate the third view by excluding disputes arising out of the exercise of *discretionary rights* by a coastal state pursuant to its regulatory and enforcement jurisdiction. Subparagraph 3(a) of the draft article thus excludes from compulsory procedures disputes arising within the economic zone of a coastal state except in instances where the exercise of coastal jurisdiction in the zone amounts to an abuse of power.<sup>21</sup> The subparagraph, in effect, attempts to protect coastal states from constant harassment by being dragged into courts by those who are seeking to challenge the regulatory and enforcement measures undertaken by a coastal state within the economic zone.

While the protection of coastal states against possible harassment is a legitimate concern, it is also equally important to note that the complete exclusion of all disputes for all time may not be consistent with the idea of achieving protection of the rights and interests of all the actors in the new world order of the oceans to be created by the Law of the Sea Convention. A proper balance must accordingly be found in this article to achieve this desired goal. That balance may be said to exist in the present Article 17 taken as a whole. As can be seen, the draft article aims at enumerating exhaustively cases which a state may exclude from the compulsory procedures, and also by virtue of subparagraph 3(a) recognizes the sovereign rights of coastal states. The sovereignty of the coastal state is further protected through the subparagraph when it is applied in conjunction with the rule of exhaustion of local remedies as stipulated under draft Article 14:

#### Article 14

1. In the case of a dispute between two or more Contracting Parties relating to the exercise by a coastal State of its enforcement jurisdiction in accordance with this Convention, or relating to its exercise of jurisdiction over resources in the economic zone, a Contracting Party shall not be entitled to submit a dispute to the procedure specified in Articles 9 and 10 of this chapter, if local remedies have not been previously exhausted as required by international law.

2. In any other dispute relating to the interpretation and application of this Convention, a Contracting Party which has taken measures alleged to be contrary to this Convention shall not be entitled to object to the jurisdiction of the tribunal under Articles 9 and 10 of this Chapter solely on the ground that local remedies have not been exhausted as required under international law.

The rule requiring exhaustion of local remedies as a precondition for international proceedings is one of the oldest rules of international law.<sup>22</sup>

<sup>21</sup> What constitutes *abus ou détournement de pouvoir* will require further examination. See note 19 *supra*.

<sup>22</sup> For an extensive analysis of the origin, nature, and scope of this rule see, e.g., A. O. Adede, *Exhaustion of Local Remedies as a Precondition of International Pro-*

By the application of this rule, a state is not to be held internationally responsible if it can offer adequate local remedies. Thus an international claim instituted against a state can be declared inadmissible on the grounds that the individual claimant has not exhausted local remedies. Both the treaty law and the case law on this subject establish that there are, however, conditions under which the application of the rule may be dispensed with, for example, where local remedies do not exist, or are shown to be inadequate, too slow, or likely to result in a denial of justice.<sup>23</sup>

It is accordingly arguable that the interplay between the local remedies rule as provided for above and subparagraph 3(a) of draft Article 17 should provide a balance in the protection of legitimate interests. The answer to the fundamental issue raised by draft Article 17 does not lie in the adoption of the "no reservations" view; neither does it lie in the adoption of "total exclusion of matters within domestic jurisdiction" view. It is expected that the view which allows reservations with respect to a limited category of cases will prevail. As noted earlier, the present draft Article 17 reflects this view. Similarly, the question of the category of cases which a state would agree to refer to compulsory settlement procedures should not be dealt with by a functional approach. That question ought to be dealt with comprehensively, as reflected in subparagraph 1 of the present draft Article 17 of the Working Document.

### III.

#### CONCLUSION

The comprehensive system for the settlement of disputes arising from the Law of the Sea Convention, as reflected in the 17 draft articles prepared by the Working Group, seems to be the appropriate approach to this question. Further discussions on the draft articles and their annexes will continue at the future sessions of the Conference with a view to producing final texts. In pursuing that course, the following points may be kept in mind:

(1) An effective and viable system for the settlement of disputes is one of the cornerstones of the new world order of the oceans which the Law of the Sea Convention will create. Such a system must be flexible enough to allow states wide choices of modes of settlement, including third-party settlement procedures entailing binding decisions.

(2) States should accordingly consider accepting a settlement system that includes compulsory procedures from which only limited and justifiable exceptions are permitted. A commitment by a state to submit future disputes to procedures entailing binding decisions is not necessarily in-

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*ceedings*, Doctoral Dissertation in the libraries of the Fletcher School of Law and Diplomacy and of Harvard Law School (1971). See also sources cited in Sohn, *supra* note 7, at 510 n. 43.

<sup>23</sup> A brief discussion on the origin of the concept of denial of justice, relating it to the local remedies rule, is found in L. SOHN & T. BUERGENTHAL, *INTERNATIONAL PROTECTION OF HUMAN RIGHTS* 32-40 (1973).

consistent with state sovereignty.<sup>24</sup> The sole basis of international adjudication is the consent of a state to be sued. That consent may be given in each case or generally for future cases in a particular forum accepted by the state. This is the whole idea behind the present draft Article 9 of the Working Document.

(3) States should also consider accepting a system of settlement of disputes that would ensure a wide measure of uniformity in the interpretation and application of the Law of the Sea Convention. As rightly noted elsewhere,<sup>25</sup> failure to take full account of the need for uniform interpretation and application of the Convention may lead to the disintegration of the delicate compromises so carefully negotiated to offer balanced protection to competing rights and interests. The comprehensive approach is basically designed to ensure this desirable goal of maximum uniformity of interpretation of the Convention. To achieve the same goal via the functional approach would be difficult.<sup>26</sup>

(4) States are also invited to consider the view that the system of disputes settlement should be an integral part of the Law of the Sea Convention and not an optional protocol to the Convention. Relegating the dispute settlement chapter of the Convention to an optional protocol would mean that the Law of the Sea Convention has essentially rejected the idea of compulsory settlement procedures.

(5) Having regard to the nature of and the parties to the disputes that may arise under the Law of the Sea Convention, states are further invited to consider the need for the establishment of a Law of the Sea Tribunal in the manner reflected in the discussion above. The International Court of Justice, under the existing limitations in its Statute,<sup>27</sup> cannot entertain claims from individual persons, natural or juridical, and has no jurisdiction over contentious cases between a state and an international organization; its jurisdiction is limited to disputes between two or more states. Since law of the sea disputes will include a mixture of claims brought by such parties, and since the International Court of Justice does not have jurisdiction over all of them, a clear option must be left open for the establishment of a new tribunal with broader jurisdiction.<sup>28</sup> The new tribunal and the

<sup>24</sup> See also paper by Ambassador R. Galindo Pohl, (El Salvador), *The Settlement of Disputes on the Law of the Sea*, presented in Boston, Feb. 2, 1975.

<sup>25</sup> Sohn, *supra* note 7, at 516.

<sup>26</sup> After the Mixed Arbitral Tribunals, established by the 1919 Peace Treaties, ran into difficulties, a special appeal procedure was established, allowing recourse to the Permanent Court of International Justice.

<sup>27</sup> ICJ Statute, Article 34(1).

<sup>28</sup> Article 20 of the Draft Statute of the Law of the Sea describes the competence of the Court as follows:

States, international organizations, and natural and juridical persons may be parties before the Tribunal in any case expressly provided for in this Convention or in an international agreement, public or private, accepted by all the parties to the dispute.

See *supra* note 8, at 6. See also, in this connection, draft Article 13 of the Working Document, *supra* pp. 811-12.

existing Court would thus supplement each other so as to afford individuals and the Seabed Authority, for example, procedural rights under the Law of the Sea Convention. As noted earlier, the argument that the establishment of such a tribunal would result in plurality of jurisprudence does not seem persuasive.<sup>29</sup>

(6) Finally, states are invited to take note of the fact that "while the larger and richer countries can apply extra-legal, political and economic pressures to achieve their ends, it is especially important for small countries and developing countries to have disputes directed into legal channels where the principle of equality before the law prevails."<sup>30</sup> Thus, both the substantive law of the Convention and the procedural mechanisms established therein must protect the rights and interests of all states and should, accordingly, depart from the traditional systems which were established to protect the interests of industrialized Western states.

<sup>29</sup> Since many of the developing countries have not accepted the compulsory jurisdiction of the International Court of Justice and since there has been general discontent with that court as a result of its earlier decisions on the South West African cases, the developing countries may consider accepting the jurisdiction of a new tribunal created through a process in which they actively participated. Thus the option for the establishment of such a tribunal should be left open. A categorical rejection of the establishment of the tribunal would be unwise.

<sup>30</sup> Sohn, *supra* note 7, at 516.



## INTERNATIONAL TREATIES AND THEIR APPLICATION ON THE TERRITORY OF THE USSR

By Igor P. Blishchenko \*

In pursuing a consistent policy of peaceful coexistence of states with different social systems, proletarian internationalism, and strengthening relations with socialist and developing countries of Asia, Africa, and Latin America, the Soviet State concludes over 400 treaties and agreements a year.

One of the basic principles of the foreign policy of the USSR is the strict and consistent observance of these treaties and agreements in accordance with the principle *pacta sunt servanda*. It is well known that in order to make an international treaty effective, it is necessary to guarantee its implementation on the territory of a state which is a party to the treaty and to ensure its observance by different bodies and organizations and individuals in that state.

Different Soviet organizations and legal authorities, as well as citizens of that country, are often confronted with the problem of adopting the right approach toward an international treaty or of taking the right line in their conduct in the event of a conflict between an international treaty and a local law.

I think that it is generally understood that a local court, state and public bodies, and citizens must strictly observe and properly implement a treaty which has been signed and ratified and has come into force. To ensure the proper functioning of a treaty on the territory of a state, it is necessary first of all to inform the relevant organizations and authorities of that country about it. Publication of the full text of a treaty in an official publication is sufficient to make it valid as a municipal law with all the relevant consequences. In the theory of international law,<sup>1</sup> there is a rather widespread opinion about the necessity of this so-called "transformation" of an international treaty into a national law through a special act confirming that the international treaty, which has just come into force, has become a rule operative in municipal law. On the other hand, according to the practice adopted by many states, it is sufficient merely to publish the

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<sup>1</sup> See I. P. BLISHCHENKO, *MEZHDUNARODNOE I VNUTRIGOSUDARSTVENNOE PRAVO* (1960); T. P. Grevtsova, *Mezhdunarodnyi dogovor v sisteme istochnikov Sovetskogo vnutrigosudarstvennogo prava*, *SOVETSKII EZHEGODNIK MEZHDUNARODNOGO PRAVA* 1963, at 171-79 (1964); S. A. IVANOV, *PROBLEMY MEZHDUNARODNOGO REGULIROVANIIA TRUDA*, Chapter 3 (1964); V. F. Meshera, *O mezhdunarodnom dogovore kak istochnike Sovetskogo prava*, *PRAVOVENDENIE* no. 1 (1963), at 124-26; N. V. MIRONOV, *SOVETSKOE ZAKONODATEL'STVO I MEZHDUNARODNOE PRAVO* (1968); N. M. MINASIAN, *SUSHCHNOST' SOVREMENNOGO MEZHDUNARODNOGO PRAVA* (1962); E. T. USENKO, *FORMY REGULIROVANIIA SPETSIALISTICHESKOGO MEZHDUNARODNOGO RAZDELENIIA TRUDA*, Chapter 5 (1965); V. G. BUTKEVICH, *SOVETSKAIA KONSTITUTSIIA I MEZHDUNARODNYI DOGOVOR* (1972).

text of a treaty in an official organ. A number of jurists have started to advocate the idea that an international treaty can be adopted or borrowed by municipal law without any change of form;<sup>2</sup> the crucial matter is the consent given by a state to an international treaty irrespective of the form of such consent. We believe that all these theories make much too complicated the solution of the problem of making an international treaty function as national law. The only justifiable purpose of reproducing some basic elements of a treaty in the national legal system is the improvement of municipal law itself. This is a process of independent lawmaking, and it is not necessarily connected with the problem of coordination of an international treaty with municipal law and consequently has nothing to do with so-called "transformation" in the usual sense in which that term is used by the jurists of the West.

The point is quite different. May an international treaty which has come into force be directly binding on state and public organizations and individuals and grant them certain rights, and if it may, what are the ways and means of achieving that result? We believe that an international treaty may act in that way. That being so, the problem boils down to the question of the form of making a treaty public, and it is up to the government to decide which form to choose. When we say making it public, we mean due notification to an organization or a state body which is to implement that treaty.<sup>3</sup> It is our belief that the nature of the treaty as international law does not change and that its having come into force in the territory of a state does not make it become a rule of municipal law.

At the same time, by virtue of the national acts of concluding, ratifying, and publishing a treaty, its functioning in the territory of a given state operates on lines similar to the functioning of a national law. It is well known in practice that a treaty comes into force in the territory of a state from the date of its publication, although it creates certain obligations and rights for a state immediately upon its coming into force.

The publication of a treaty means that it is put into operation by a legislative body of that state; the act of publication, as well as the previous ratification and adoption by a legislative body, gives an international treaty the force of a national law.

Thus the conflict of a municipal rule with a treaty rule, if it does take place, should in fact be treated like a conflict of two municipal rules, and in this case usually the principle of *lex posterior derogat priori* is applied. This is accounted for by the very nature of the power of the state, which possesses sovereignty within that state as well as outside it. The authority of the Supreme Soviet of the USSR and the Presidium of the Supreme Soviet in adopting and ratifying an international treaty or in introducing legislation ratifying an international treaty or in issuing edicts (laws—

<sup>2</sup> See I. Seidl-Hohenveldern, *Transformation or Adoption of International Law into Municipal Law*, 12 INT. & COMP. L. Q. 83 (1963); and BULLETEN' CHEKHOSLOVATSKOGO PRAVA, no. 3 (1955).

<sup>3</sup> But if it is not notified, the nonobservance of the treaty by individuals, organizations, or a state body does not entail any responsibility by them to the state.

ukases) comes out of one and the same power and creates in each of these cases legal acts of equal validity. It should be emphasized that in a socialist state both municipal law and international law are based on specific historic conditions determined first of all by the economic needs of the society and that both systems of law are aimed at the development of the principles of international and municipal law ensuring the progressive development of mankind, peace, and the peaceful coexistence of states with different social and economic systems.

There is also a problem when a treaty becomes invalid. Is it always necessary to issue a special legal act abrogating the treaty on the territory of that state? In cases of denunciation of a treaty, there is no need to issue a special legal act, since denunciation as such is a national legal act. When the treaty becomes invalid on the basis of terms stipulated in it, it is quite sufficient to publish informational notice about it in an official state organ. In our opinion it is only when a treaty has lost its force that a special legal act annulling it should be issued.

International treaties concluded by the Soviet State have a certain effect on our municipal law, just as international law is to a certain extent influenced by the legislation of the USSR. This two-way influence finds its expression in improvement and development of the rules and institutions of international and municipal law. The distinction should be drawn between the influence of international and municipal law on each other by way of completing and perfecting each of the systems and the functioning of that newly adopted international rule on the territory of a state. There are two forms of mutual influence between international and municipal law in state practice: the adoption of some element of juridical technique (such as, for example, the wide use of the treaty made in international law) and the adoption of institutions of law (such as, for example, the institution of asylum, stemming from municipal law and later becoming a rule of international law). The process of "completing" takes place when an international treaty contains a rule allowing the parties a certain freedom in how they implement that treaty.

The impact of international law on the legal system of a socialist state is mostly of a technical nature, since socialist law contains all legal democratic institutions which internal law might take from international law. As a rule, the process of completion of the law takes place only in the case of a blanket-type international rule. Thus, Article 5 of the Convention on the Prevention and Punishment of the Crime of Genocide specifies:

The Contracting Parties undertake to enact, in accordance with their respective Constitutions, the necessary legislation to give effect to the present Convention and in particular to provide effective penalties for persons guilty of genocide or any of the other acts enumerated in article 3 [namely, conspiracy to commit genocide, direct and public incitement to commit genocide, attempt to commit genocide, and complicity in genocide].<sup>4</sup>

<sup>4</sup> Adopted by the General Assembly, Dec. 9, 1948, 78 UNTS 277.

But the Soviet law goes further and makes provision for a definite punishment for committing such crimes as violation of national and racial equality. In accordance with Article 11 of the Law on Criminal Responsibility for Crimes Against the State of December 25, 1958,<sup>5</sup> propaganda for the purpose of arousing racial or national hostility as well as the direct or indirect restriction of rights of citizens and granting direct or indirect privileges to citizens on the ground of their nationality or race are punished by deprivation of freedom for a term of six months to three years, or by exile for a term of two to five years. Thus, in this case, a treaty and a law are complementary and operate without any confirmation by special acts issued for this purpose by state bodies.

On December 8, 1961, two important laws were adopted in the Soviet Union; one of them was the Fundamental Principles of Civil Legislation, and the other the Fundamental Principles of Civil Procedure. These laws contain general provisions dealing with the rights of aliens and stateless persons and their procedural rights arising out of the application of civil laws of foreign countries, decisions of international courts, and international treaties and agreements. The characteristic feature of all these provisions is that they embody treaty principles, as well as generally adopted rules of contemporary international law. Article 129 of the Basic Civil law<sup>6</sup> and Article 64 of the Civil Procedure Act<sup>7</sup> contain provisions on the application of international treaties. Article 129 provides:

If by an international treaty or an international agreement to which the USSR is a party other rules are laid down than those provided for by Soviet civil legislation, then the rules of the international treaty or agreement shall be applied.

The same provision shall apply with respect to the territory of a Union Republic if by an international treaty or agreement to which a Union Republic is a party other rules are laid down than those provided for by the civil legislation of that Union Republic.

It is emphasized in this article that the Soviet Union consistently observes the obligations undertaken by it under an international treaty. Article 129 is a legal guarantee of the effectiveness of an international treaty, ensuring its application on the territory of the USSR. The stress is laid on the necessity of applying a rule of a treaty which was concluded after the law dealing with the same question was issued, if this treaty rule involves the relations of the Soviet State with other states. (The practice of the Soviet State proves that a law which contradicts a previously concluded treaty is never issued.) At the same time, *leges speciales* are created with respect to the question settled by the law, if a treaty providing for some other legal ordering is concluded between the USSR and a foreign state or states. In this case the legal force of a treaty rule is equal to that of the law and must be given effect. In fact, a law and a

<sup>5</sup> VEDOMOSTI VERKHOVNOGO SOVETA SSSR (1959), no. 1, item 8.

<sup>6</sup> VEDOMOSTI VERKHOVNOGO SOVETA SSSR (1961), no. 50, item 525.

<sup>7</sup> *Id.*, no. 50, item 526.

treaty rule are applied simultaneously. It is essential that the substance of this principle should be properly understood in connection with a series of bilateral treaties concluded by the Soviet Union and dealing with legal assistance in the field of civil, criminal, and family affairs, social insurance, and consular matters, which sometimes create a regime somewhat different from the one stipulated by a general rule. Thus, in accordance with appropriate international treaties, the Statute on Diplomatic and Consular Representations of Foreign States on the Territory of the USSR, adopted on May 23, 1966,<sup>8</sup> provides for the possibility of granting a wider scope of immunity to consular representatives and members of their families.

Let us assume the following case: A Soviet citizen, Mrs. M., came to a legal office and asked for the certification of a document issued by the Embassy of the People's Republic of Hungary in which it was stated that a child born to this woman, who was married to Mr. B., a Hungarian by nationality, was acknowledged as a national of the People's Republic of Hungary at the request of the child's parents. The general rule regulating such situations in the territory of the Russian Federation is stated in Article 35 of the Family Code of the Russian Socialist Federated Soviet Republic.<sup>9</sup> It says:

When parents are nationals of different countries and if on the date of a child's birth one of them is a citizen of the Russian Socialist Federated Soviet Republic and if at least one of the parents lives in the Soviet Union on the date of a child's birth, then a child is granted citizenship of the Russian Socialist Federated Soviet Republic.

But in that particular case a notary had to take into account, besides the provision of the above-mentioned Article 35, the provision of paragraph 2 of Article 4 of the Convention concluded between the USSR and Hungarian People's Republic on August 24, 1957,<sup>10</sup> dealing with persons of double nationality and stating in particular that, if one of the parents is a national of the USSR and the other is a national of the Hungarian People's Republic, the nationality of their underage children is determined by the parents, who must file an appropriate application to the embassy. Thus with regard to the question of citizenship of the Hungarian People's Republic, this convention has created a special regime in the territory of the USSR, which differs from the generally adopted one. Thus a notary to whom Mrs. M. turned should certify the document issued by the Embassy of the Hungarian People's Republic. In this respect Article 61 of the Fundamental Principles of Civil Procedure in the USSR and the Union Republics<sup>11</sup> is also noteworthy. It provides:

Bringing an action against a foreign State, securing an action, and sequestrating property of a foreign State within the USSR is allowed only with the consent of competent agencies of the corresponding State.

<sup>8</sup> VEDOMOSTI VERKHOVNOGO SOVETA SSSR (1966), no. 22, item 387.

<sup>9</sup> VEDOMOSTI VERKHOVNOGO SOVETA RSFSR (1969), no. 32, item 1086.

<sup>10</sup> See 20 SBORNIK DOGOVOROV I KONVENTSIJ, ZAKLIUCHENNYKH SSSR S INOSTRANNYMI GOSUDARSTVAMI 213 (1961); 318 UNTS 3.

<sup>11</sup> See *supra* note 7.

Diplomatic representatives of the States accredited in the USSR and other persons indicated in the respective laws and international agreements are within the jurisdiction of Soviet courts in civil cases only within the limits defined by the rules of international law or agreements with the State concerned.

When a foreign State does not guarantee the Soviet State, its property, or its representatives judicial immunity equal to that granted to foreign States, their property, and their representatives in the Soviet Union, in accordance with the provisions of this article, the Council of Ministers of the USSR and other competent agencies may be given the right to take reciprocal measures with regard to that State, its property or its representatives.

A generally accepted custom of contemporary diplomatic and consular law embodied in this article has become a law and as such is now observed and applied in the territory of the USSR. A special provision dealing with retorsion, often applied in diplomatic practice, is included in this article as well. The examples that have been mentioned prove that the legal force of an international rule applied in the territory of a state is equal to that of a national rule in force in that state. International law and internal law do not exclude each other; they are complementary.

It is interesting to compare this approach with the decision at the Court of Cassation of Belgium in the case of *Fromagerie Franco-Suisse "Le Ski" Etat belge*.<sup>12</sup> The Court stated:

Que le conflit qui existe entre une norme de droit établie par un traité international et une norme établie par une loi postérieure, n'est pas un conflit entre deux lois;

Attendu que la règle d'après laquelle une loi abroge une loi antérieure dans le mesure où elle la contredit, est sans application au cas où le conflit oppose un traité et une loi.

Attendu que, lorsque le conflit existe entre une norme de droit interne et une norme de droit international qui a des effets directs dans l'ordre juridique interne, la règle établie par le traité doit prévaloir; que la prééminence de celle-ci résulte de la nature même du droit international conventionnel.

. . . lorsque le conflit existe entre une norme de droit interne et une norme de droit international qui a des effets directs dans l'ordre juridique interne, la règle établie par le traité doit prévaloir.

The West German jurist A. Ushakow in his book on Soviet private international law<sup>13</sup> made an attempt to declare that Soviet jurists, admitting the extraterritorial character of law, especially in the field of foreign trade and nationalization, advocate the theory of the primacy of internal law.

<sup>12</sup> 158 PASICRISIE BELGE, Part I, 886, 914 (Cour de cassation, 1971); see J. J. Salmon, *Le conflit entre le traité international et la loi interne en Belgique à la suite de l'arrêt rendu le 27 Mai 1971 par la Cour de Cassation*, 86 JOURNAL DES TRIBUNAUX 509 and 529 (1971).

<sup>13</sup> A. USCHAKOW, *DOS SOWJETISCHE INTERNATIONALE PRIVATRECHT 1917 BIS 1962*, at 51-52 (1964).

Prof. B. Meissner<sup>14</sup> took the same position. From the United States, Professor G. Ginsburgs in his article "The Validity of Treaties in the Municipal Law of the 'Socialist' States,"<sup>15</sup> quoting my book *International and Internal Law*, and the book by Professor V. Minasian,<sup>16</sup> has written that Soviet jurists want to impose their institutions on others and to have a monopoly in the development of legal institutions in the world.

Such an approach has no basis in fact. Soviet literature reflects different opinions, but nothing that has been written in the Soviet Union could lead to such conclusions.

The problem of relations between international and internal law is a complex one, and a great number of jurists in many countries have tried to solve it. As was stated in my book *International and Internal Law*,<sup>17</sup> the problem of relations between international law and municipal law has three aspects which are interconnected and interdependent. The first aspect of the problem concerns relations between international law taken as a system and internal law as a set of rules. Another aspect deals with relations between an international rule and an internal law rule; and finally, the third aspect is concerned with the application of an international legal rule within the territory of a state and the functioning of an internal law rule in the sphere governed by international law. Separate examination of each of these questions will not bring about a solution of the problem as a whole, since each of these questions constitutes only a part of the problem.

Let us now turn to the first aspect of the problem. We believe that it is essential to begin consideration of the matter with an analysis of the force of international law and internal law in terms of their material substance by considering the relations between international law and internal law in terms of their operation as legal systems, as special forms of reflecting public and productive relations. The direct form of the impact of the internal processes of a state on the development of international law, in my opinion, is through the legal consciousness of the ruling class. It is through the legal consciousness of the ruling class (of all the people in a people's state), which represent the state—the subject of international law in the international arena—that a national rule, national legal order, and national legal systems determine the creation and development of international rules. The growing influence and increased role played by the people at large in the sphere of international relations, their influence on governments, which has become possible as the result of changes in the correlation of forces in the international arena in favor of peace and socialism—all this has an increasing impact on the formation of the legal consciousness of the ruling class and of international rules derived there-

<sup>14</sup> B. MEISSNER, *SOWJETUNION UND VÖLKERRECHT 1917 BIS 1962*, at 76 (1963).

<sup>15</sup> G. Ginsburgs, *The Validity of Treaties in the Municipal Law of the "Socialist" States*, 59 AJIL 523, 538 (1965).

<sup>16</sup> See BLISHCHENKO, *supra* note 1 at 223; MINASIAN, *ISTOCHNIKI SOVREMENNOGO MEZHDUNARODNOGO PRAVA* 133-49 (1960).

<sup>17</sup> BLISHCHENKO, *supra* note 1 at 5.



from.<sup>18</sup> At the same time, it should be emphasized that the legal consciousness of partners is greatly influenced by the existing system of international law as the law of peace and peaceful coexistence, its basic principles expressing the will of the people and reflecting objective rules of development of international relations. National law may be regarded only as an indirect source of present day international law. It merely influences the creation of an international custom or an international rule through the force of legal consciousness. National rules which in their own right do not serve as the direct source of international law governing international relations nevertheless can reflect rules and principles of international law and at the same time find their own reflection in the rules of international law. A typical misrepresentation of this conception is seen in the comment expressed by an American jurist, Bernard Ramundo,<sup>19</sup> on the book of Professor H. M. Minasian, who had written that the democratic laws of a state may contribute to the development of international law and to the process of defining international rules and in certain conditions may serve as a source of international law. Ramundo writes that this statement is geared to the tasks set by Soviet policy. If Ramundo had paid attention to the process of drafting the Vienna Conventions on Diplomatic Relations (1961) and Consular Relations (1963), he would have arrived at the same conclusion, since a number of rules embodied in these conventions were the result of the lawmaking practice of some states (*e.g.*, the procedure regulating relations, some privileges and immunities, the seniority rule). It was possible for these provisions to become treaty rules of international law not only because some of them were at the same time generally accepted international rules, but because these rules were democratic by their nature. It is in this sense that we refer to the primacy of national law in the emergence and development of international law rules. When we speak about the impact of systems of national law and the primacy of national law over international law in the process of the latter's creation and development, what we have in mind above all are those rules and institutions which express the nature of the social relations in a given state and influence the whole system of national law (such as, for example, the institution of property). Depending on historic circumstances, the influence of national law on international law may be either positive or negative. Thus doubtless the national legal institute of bourgeois property predetermined the regime of capitulations and one-sided agreements, while the present national legal order of some capitalist states predetermined the preservation of colonial systems which violate the rules of international law. At the very beginning of its development and later on in a definite historic situation, which was above all determined by the correlation of class forces in a state, the internal legal order of capitalist states has beneficially influenced international law. Let us re-

<sup>18</sup> See E. A. Korovin, *K voprosu o roli narodnykh mass v razvitií mezhdunarodnogo prava*, SOVETSKOE GOSUDARSTVO I PRAVO, no. 3, at 19-29 (1956).

<sup>19</sup> B. A. RAMUNDO, PEACEFUL COEXISTENCE: INTERNATIONAL LAW IN THE BUILDING OF COMMUNISM 69-70 (1967).



call, for example, such principles of contemporary international law, first proclaimed by the bourgeoisie, as sovereignty, nonintervention, and equality of states. Because of the nature of the socialist system, the influence of the socialist legal order on the development of present day international law is always progressive, since it is aimed at the further development of international law as the law of peace and peaceful coexistence responding to the interests of democracy and of peoples. There is thus no ground for the statement that socialist countries force their institutions upon others. The question is one of an objective process of development which influences the creation and development of international law.

As to the second aspect of the problem, when it is necessary to apply an international treaty in the territory of a state, there may be a confrontation of the rules of international law and those of national law. As can be seen, the above analysis of this question does not provide any grounds for allegations that the institutions of Soviet law are imposed on other countries.

As to the third aspect of this problem, we have already emphasized the application, through custom, of both national laws in the international law sphere and international law institutions in the sphere of national law. In other words the question is one of the forms of functioning of a number of institutions of international law (such as *par in parem non habet imperium*, *pacta sunt servanda*, monopoly of foreign trade, nationalization) in national legal systems. Here we do not have in mind only the law of a socialist state. We have tried to formulate a general principle characteristic of the practice of all states. In this case, again, an attempt to accuse Soviet jurists of imposing their legal principles and institutions on the world is not consistent with the actual contents of the concept of the correlation of international law and internal law. As is clear from the above, Soviet jurists working in the sphere of international law, contrary to the allegations of some of the jurists in the West, by no means claim a monopoly in the field of creating rules of contemporary international law. Proceeding from a deep study of the objective rules of development of the human society, they deal extensively with the complicated process of creating rules of present day international law and stress that an important part in this process is played by socialist countries, consistently struggling for the strengthening of universal peace, for international law and order as the legal order of peace and peaceful coexistence, and for the support of democracy and social progress.

# THE REVISED OAS CHARTER AND THE PROTECTION OF HUMAN RIGHTS

By Thomas Buergenthal \*

## I.

### INTRODUCTION

The "Protocol of Buenos Aires," which revised the Charter of the Organization of American States, entered into force in 1970.<sup>1</sup> It changed the legal status of the Inter-American Commission on Human Rights in a number of important respects and strengthened the normative character of the American Declaration of the Rights and Duties of Man. These are most significant developments, and yet they have gone largely unnoticed in the literature.

The purpose of this note is to analyze the transformation that the inter-American system for the protection of human rights has undergone as a result of the revision of the OAS Charter. To understand what changes have been effected, it is necessary to describe the evolution of that system. We shall deal with this subject first.

## II.

### HUMAN RIGHTS AND THE 1948 OAS CHARTER

The 1948 Charter of the Organization of American States<sup>2</sup> contained a number of general human rights provisions. Most important of these was Article 5(j), which declared that "the American States proclaim the fundamental rights of the individual without distinction as to race, nationality, creed or sex."<sup>3</sup> But the Charter neither defined the rights mentioned in Article 5(j) nor did it establish any procedures to ensure their implementation.

\* Of the Board of Editors.

<sup>1</sup> The "Protocol of Buenos Aires" was signed at that city on February 27, 1967. The amended OAS Charter entered into force on February 27, 1970. 21 UST 607, TIAS No. 6847, 64 AJIL 996 (1970). See generally Sepúlveda, *The Reform of the Charter of the Organization of American States*, 137 HAGUE REC. DES COURS 83 (1972); Dreier, *New Wine and Old Bottles: The Changing Inter-American System*, 22 INT. ORG. 477 (1968); Robertson, *Revision of the Charter of the Organisation of American States*, 17 INT. & COMP. L. Q. 346 (1968).

<sup>2</sup> The original Charter of the Organization of American States [hereinafter [1948] OAS Charter] was signed at Bogotá, Colombia, on April 30, 1948, and entered into force on December 13, 1951, [1951] 2 UST 2394, TIAS No. 2361, 119 UNTS 48, 46 AJIL SUPP. 43 (1952).

<sup>3</sup> See also [1948] OAS Charter, Article 13, which declared that "each State has the right to develop its cultural, political and economic life freely and naturally. In this free development, the State shall respect the rights of the individual and the principles of universal morality." Both Articles 5(j) and 13 have been retained in the amended Charter as Articles 3(j) and 16, respectively.

The same conference that produced the OAS Charter—the Ninth International Conference of American States which met in Bogotá, Colombia, in 1948—also proclaimed the American Declaration on the Rights and Duties of Man.<sup>4</sup> This instrument was adopted in the form of a simple resolution which declared that “the international protection of the rights of man should be the principal guide of an evolving American law.” But whatever the legal effect in the inter-American system of conference resolutions embodying statements of legal principle—this is a subject of considerable controversy<sup>5</sup>—the Bogotá conference went on record with an understanding that Article 5(j) of the OAS Charter did not, through incorporation by reference, transform the provisions of the American Declaration into “contractual” obligations.<sup>6</sup> A year later the Inter-American Juridical Committee ruled that “it is obvious that the Declaration of Bogotá does not create a legal contractual obligation”<sup>7</sup> and that, consequently, it lacked the status of “positive substantive law.”<sup>8</sup>

Efforts to establish an institutional framework for the promotion of human rights within the inter-American system proved unsuccessful for many years.<sup>9</sup> Finally, in 1959, the Fifth Meeting of Consultation of Ministers of Foreign Affairs adopted a resolution<sup>10</sup> creating “an Inter-American Commission on Human Rights, composed of seven members elected, as individuals, by the [OAS] Council.” It further stipulated that “the Commission, which shall be organized by the Council . . . and have the specific functions that the Council assigns to it, shall be charged with furthering respect for [human] rights.” The OAS Council complied with this man-

<sup>4</sup> Res. XXX, *Final Act of the Ninth International Conference of American States, Bogotá, Colombia, March 30–May 2, 1948*, at 38 (PAU 1948); INTER-AMERICAN COMMISSION ON HUMAN RIGHTS, *HANDBOOK OF EXISTING RULES PERTAINING TO HUMAN RIGHTS* [hereinafter cited as I-ACHR, *HANDBOOK*], OAS OFF. REC., OEA/Ser.L/V/II.23, Doc. 21 (English) Rev. 2, at 15 (1975).

<sup>5</sup> See generally C. FENWICK, *THE ORGANIZATION OF AMERICAN STATES* 155–57 (1963); M. BALL, *THE OAS IN TRANSITION* 119–20 (1969).

<sup>6</sup> DEPT. OF STATE, *REPORT OF THE DELEGATION OF THE UNITED STATES OF AMERICA TO THE NINTH INTERNATIONAL CONFERENCE OF AMERICAN STATES, BOGOTÁ, COLOMBIA, MARCH 30–MAY 2, 1948*, at 35–36 (Publ. No. 3263, 1948). For a useful discussion of the legislative history of the interrelationship between the human rights provisions of the [1948] OAS Charter and the American Declaration, see A. SCHREIBER, *THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS* 16–22 (1970). See also PAN AMERICAN UNION, *HUMAN RIGHTS IN THE AMERICAN STATES* 115–16 (Prelim. ed. 1960).

<sup>7</sup> Inter-American Juridical Committee, *Report to the Inter-American Council of Jurists Concerning Resolution XXXI of the Bogotá Conference, September 26, 1949*, reprinted in PAN AMERICAN UNION, *HUMAN RIGHTS IN THE AMERICAN STATES* 163, at 164 (Prelim. ed., 1960).

<sup>8</sup> *Id.* at 165.

<sup>9</sup> For a review of developments between 1948 and 1959, see I-ACHR, *THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS: ACTIVITIES OF THE INTER-AMERICAN COMMISSION ON HUMAN RIGHTS 1960–1967*, at 3–9 (1972); M. Ball, *Issues for the Americas: Non-Intervention v. Human Rights and the Preservation of Democratic Institutions*, 15 INT. ORG. 21, 25–26 (1961).

<sup>10</sup> Res. VIII, *Fifth Meeting of Consultation of Ministers of Foreign Affairs, Santiago, Chile, August 12–18, 1959, Final Act*, OAS OFF. REC. OEA/Ser.C/II.5 (English), at 10–11 (1960).

date in 1960 when it promulgated the Statute of the Commission,<sup>11</sup> its constitutive instrument, and elected the seven individuals who shortly thereafter were sworn in as the first members of the Commission.<sup>12</sup>

The Statute described the newly created Commission as "an autonomous entity" of the OAS the function of which was "to promote respect for human rights."<sup>13</sup> Significantly, it declared that "for the purpose of this Statute, human rights are understood to be those set forth in the American Declaration of the Rights and Duties of Man."<sup>14</sup> The principles proclaimed in the American Declaration thus became the standards to be applied by the Commission in exercising its functions.

The powers of the Commission were set out in Article 9 of its Statute, which reads as follows:

In carrying out its assignment of promoting respect for human rights, the Commission shall have the following functions and powers:

(a) To develop an awareness of human rights among the peoples of America;

(b) To make recommendations to the governments of the member states in general, if it considers such action advisable, for the adoption of progressive measures in favor of human rights within the framework of their domestic legislation and, in accordance with their constitutional precepts, appropriate measures to further the faithful observance of those rights;

(c) To prepare such studies or reports as it considers advisable in the performance of its duties;

(d) To urge the governments of the member states to supply it with information on the measures adopted by them in matters of human rights;

(e) To serve the Organization of American States as an advisory body in respect of human rights.

Shortly after assuming office, the Commission formally interpreted Article 9(b) of its Statute to empower it "to make general recommendations to each individual member state, as well as to all of them."<sup>15</sup> Relying on this interpretation, the Commission asserted the authority to study the so-called "situation relating to human rights" in various American Repub-

<sup>11</sup> The text of the 1960 Statute of the Commission is reproduced in I-ACHR, BASIC DOCUMENTS, OAS OFF. REC. OEA/Ser.L/V/II.4 Rev. (English), at 9 (1963). The amended Statute now in effect is reproduced in I-ACHR, HANDBOOK, *supra* note 4, at 23.

<sup>12</sup> [1960] *Annual Report of the Secretary General*, OFF. REC. OEA/Ser.D/III.12 (English), at 19-20 (1961).

<sup>13</sup> Statute of the Inter-American Commission on Human Rights [hereinafter cited as Statute], Art. 1.

<sup>14</sup> Statute, Art. 2.

<sup>15</sup> I-ACHR, *Report on the Work Accomplished During its First Session, October 3-28, 1960*, OAS OFF. REC. OEA/Ser.L/V/II.1, Doc. 32 (English), at 10 (1961). See Sandifer, *Human Rights in the Inter-American System*, 11 How. L. J. 508, 517-18 (1965); Scheman, *The Inter-American Commission on Human Rights*, 59 AJIL 335, 337-39 (1965).

lics; to address recommendations to governments that engaged in large-scale violations of human rights; and to publish reports documenting violations of human rights in various countries, among them Cuba, Haiti, and the Dominican Republic.<sup>16</sup> In carrying out these and subsequent country studies, the Commission examined complaints, heard witnesses, and in some cases undertook on-the-spot investigations.<sup>17</sup>

With regard to individual complaints, the Commission formally ruled in 1960 that its Statute did not empower it "to make any individual decision regarding the written communications . . . it receives involving the violation of human rights in the American states, although, for the most effective fulfillment of its functions, the Commission shall take cognizance of them by way of information."<sup>18</sup> Repeated attempts by the Commission to obtain authorization to act on individual communications remained unsuccessful until 1965.<sup>19</sup> In that year the Second Special Inter-American Conference enlarged the powers of the Commission in a number of significant respects.<sup>20</sup> The Conference requested the Commission "to conduct a continuing survey of the observance of fundamental human rights in each of the [OAS] member states," and "to give particular attention in this survey to [the] observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man."<sup>21</sup> To enable it to carry out these functions, the Conference authorized the Commission to examine communications from individuals charging violations of the aforementioned rights;<sup>22</sup> to "address to the government of any American state a request for information deemed pertinent by the Commission;" and to make recommendations

<sup>16</sup> For a review of this practice, see Thomas & Thomas, *The Inter-American Commission on Human Rights*, 20 SW. L. J. 282, 287-305 (1966); K. VASAK, LA COMMISSION INTERAMÉRICAINNE DES DROITS DE L'HOMME 124-38 (1968). Some of the "country reports" are reproduced in I-ACHR, THE ORGANIZATION OF AMERICAN STATES AND HUMAN RIGHTS: ACTIVITIES OF THE COMMISSION ON HUMAN RIGHTS 1960-1967, pt. III (1972); L. SOHN & T. BUERGENTHAL, INTERNATIONAL PROTECTION OF HUMAN RIGHTS 1293-340 (1973).

<sup>17</sup> See, e.g., A. Schreiber & P. Schreiber, *The Inter-American Commission on Human Rights in the Dominican Crisis*, 22 INT. ORG. 508, 510-19 (1968); INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, THE INTER-AMERICAN SYSTEM: ITS DEVELOPMENT AND STRENGTHENING 45-55 (1966).

<sup>18</sup> I-ACHR, *Report on the Work Accomplished During its First Session, October 3 to 28, 1960*, OAS OFF. REC., OEA/Ser.L/V/II.1, Doc. 32 (English), at 13 (1961).

<sup>19</sup> See, e.g., I-ACHR, *Report on the Work Accomplished During its Third Session, October 2-November 4, 1961*, OAS OFF. REC. OEA/Ser.L/V/II.3, Doc. 32 (English), at 16-17 (1962). See also BALL, *supra* note 5, at 375-77.

<sup>20</sup> Res. XXII, *Second Special Inter-American Conference, Rio de Janeiro, Brazil, November 17-30, 1965, Final Act*, OAS OFF. REC., OEA/Ser.C/I.13 (English) at 32-34 (1965).

<sup>21</sup> These provisions deal with the right to life, liberty, and personal security (Art. I); equality before the law (Art. II); freedom of religion (Art. III); freedom of expression (Art. IV); right to a fair trial (Art. XVIII); freedom from arbitrary arrest (Art. XXV); and due process of law (Art. XXVI).

<sup>22</sup> The Commission's power to deal with these communications was conditioned on its preliminary determination that applicable domestic remedies were exhausted. Res. XXII, para. 5, *supra* note 20.

"with the objective of bringing about more effective observance of fundamental human rights." The Commission was also requested to submit an annual report to the OAS General Assembly<sup>23</sup> containing, *inter alia*, "such observations as the Commission may deem appropriate on matters covered in the communications submitted to it."

The additional powers which the Commission acquired in 1965 were incorporated into the Statute by an amendment designated as Article 9 (*bis*).<sup>24</sup> Using its combined authority under Articles 9 and 9 (*bis*), the Commission has since 1966 dealt with communications and investigated charges alleging violations of human rights directed against most American Republics.<sup>25</sup> Among its most important recent activities are a very thorough study documenting large-scale violations of human rights by Brazil<sup>26</sup> and an on-the-spot investigation carried out in 1974 by the Commission in Chile.<sup>27</sup>

<sup>23</sup> Prior to the amendment of the OAS Charter this report was to be submitted either to the Inter-American Conference or to the Meeting of Consultation of Ministers of Foreign Affairs. It now goes to the OAS General Assembly. OAS Charter, Art. 52(f).

<sup>24</sup> Res. XXII, para. 8, *supra* note 20, authorized the amendment of the Commission's Statute to give effect to the provisions of the resolution. The relevant amendments—two other provisions (Articles 7 (*bis*) and 14 (*bis*)) in addition to Article 9 (*bis*)—were adopted by the Commission in 1966. I-ACHR, *Report on the Work Accomplished During its Thirteenth Session, April 18–28, 1966*, OAS OFF. REC. OEA/Ser.L/V/II.14, Doc. 35 (English), at 22–24 (1966). Article 9 (*bis*) reads as follows:

The Commission shall have the following additional functions and powers:

a) To give particular attention to observance of the human rights referred to in Articles I, II, III, IV, XVIII, XXV, and XXVI of the American Declaration of the Rights and Duties of Man;

b) To examine communications submitted to it and any other available information; to address the government of any American state for information deemed pertinent by the Commission; and to make recommendations, when it deems this appropriate, with the objective of bringing about more effective observance of fundamental human rights;

c) To submit a report annually to the Inter-American Conference or to the Meeting of Consultation of Ministers of Foreign Affairs, which should include: (i) a statement of progress achieved in realization of the goals set forth in the American Declaration; (ii) a statement of areas in which further steps are needed to give effect to the human rights set forth in the American Declaration; and (iii) such observations as the Commission may deem appropriate on matters covered in the communications submitted to it and in other information available to the Commission;

d) To verify, as a condition precedent to the exercise of the powers set forth in paragraphs b) and c) of the present article, whether the internal legal procedures and remedies of each member state have been duly applied and exhausted.

<sup>25</sup> See, e.g., I-ACHR, *Activities of the Inter-American Commission on Human Rights (1965–1969)*, OAS OFF. REC., OEA/Ser.L/V/II.23, Doc. 11 (English) Rev., at 7–25 (1971); *Annual Report of the Inter-American Commission on Human Rights for the Year 1973*, OAS OFF. REC., OEA Ser.P/AG/Doc. 409/74 (English), at 38–100 and 106–49 (1974).

<sup>26</sup> *Annual Report of the Inter-American Commission on Human Rights for the Year 1973*, *supra* note 25, at 38–81.

<sup>27</sup> I-ACHR, *Report on the Status of Human Rights in Chile: Findings of "On-the-Spot" Observations in the Republic of Chile, July 22–August 2, 1974*, OAS OFF. REC., OEA/Ser.L/II.34, Doc. 21 (English) Corr. 1 (1974); *Observations by the Government of Chile on the "Report on the Status of Human Rights in Chile" Prepared by the Inter-American Commission on Human Rights*, OAS OFF. REC., OEA/Ser.G/CP/Doc. 385/74 (English).

## III.

THE REVISED OAS CHARTER AND THE PROTECTION OF  
HUMAN RIGHTS

The pre-1970 practice and achievements of the Commission gain in significance once it is remembered that prior to the revision of the Charter the inter-American human rights system, described in the preceding section, owed its existence not to a treaty or other legally binding instrument but to OAS resolutions and pronouncements of uncertain authority. The entire system lacked a solid constitutional basis and seemed to be shrouded in legal and institutional ambiguities. The Commission was designated an "autonomous entity" of the OAS, no doubt because this was as good a name as any for a body which was not provided for in the OAS Charter or any other treaty, was established by a simple conference resolution, and qualified neither as an organ of the OAS Council nor as a so-called "specialized organization" of the OAS.<sup>28</sup> Moreover, the human rights the promotion and observance of which the Commission was to ensure were proclaimed in the American Declaration of the Rights and Duties of Man,<sup>29</sup> an instrument not deemed to create binding legal obligations for OAS member states.<sup>30</sup> Consequently, an aura of make-believe attached to the inter-American human rights system, denying it the political authority that flows from constitutional legitimacy.

This unsatisfactory state of affairs has been dramatically altered by the revised OAS Charter. Article 51 of that instrument designates the "Inter-American Commission on Human Rights" as a principal organ of the Organization. Its functions are spelled out in Article 112 of the Charter, which reads as follows:

There shall be an Inter-American Commission on Human Rights, whose principal function shall be to promote the observance and protection of human rights and to serve as a consultative organ of the organization in these matters.

<sup>28</sup> For a careful analysis of the institutional status of the Commission, see VASAK, *supra* note 16, at 41-44. The [1948] OAS Charter, Art. 57, established only three organs of the OAS Council (the Inter-American Economic and Social Council, Council of Jurists, and Cultural Council) and did not provide for the creation of additional ones. See generally INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, *supra* note 17, at 12-14 and 16-24. The Commission did not qualify as an "Inter-American Specialized Organization" because it was not an "intergovernmental organization established by multilateral agreement" as required by Article 95 of the [1948] OAS Charter. The Commission was established by a resolution of the Fifth Meeting of Consultation of Ministers of Foreign Affairs, which was implemented by the OAS Council when it adopted the Commission's Statute. See discussion on pp. 829-30, *supra*. But even assuming that the Ministers' resolution could be regarded as a "multilateral agreement" within the meaning of Article 95, the fact remains that the steps necessary to confer that status on the Commission were never taken. See [1948] OAS Charter, Ch. XV. See also INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, *supra* note 17, at 349.

<sup>29</sup> Statute, Art. 2.

<sup>30</sup> See discussion on p. 829, *supra*.

An inter-American convention on human rights shall determine the structure, competence, and procedure of this Commission, as well as those of other organs responsible for these matters.

Although an "American Convention on Human Rights" was adopted and opened for signature in 1969, it has not as yet entered into force,<sup>31</sup> having to date been ratified by only two of the required eleven states.<sup>32</sup> Anticipating this possibility, Article 150 of the revised OAS Charter provides that "until the inter-American Convention on human rights, referred to in Chapter XVIII [Article 112], enters into force, the *present* Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights." (Emphasis added.)

What is the legal effect of the foregoing amendments? Read together, Articles 51, 112, and 150 of the revised OAS Charter indicate that today the Inter-American Commission on Human Rights is a principal organ of the OAS having two major functions: it is to promote the observance and protection of human rights, and it serves as a consultative organ of the Organization in human rights matters. How the Commission is to discharge these functions depends upon whether or not the American Convention on Human Rights has entered into force. If it has, the provisions of the Convention will "determine the structure, competence, and procedure" to be followed by the Commission.<sup>33</sup> But as long as the Convention has not entered into force, "the present Inter-American Commission on Human Rights shall keep vigilance over the observance of human rights."<sup>34</sup> In view of the fact that the Charter speaks of the "present Commission" without otherwise indicating what its "structure, competence, and procedure" shall be, and since these matters are regulated by the Statute of the Commission which predates the adoption in 1967 and the entry into force in 1970 of the revised OAS Charter, it is reasonable to assume that the reference to "present Commission" embraces the Statute and thus incorporates it by reference. In other words, by assigning certain functions to the "present Commission" without providing how these functions are to be exercised, the revised Charter must have intended the Commission to act as it is empowered to act under its Statute.<sup>35</sup> It follows that

<sup>31</sup> The American Convention on Human Rights was opened for signature at the Inter-American Specialized Conference on Human Rights, San José, Costa Rica, on November 22, 1969. The text of the Convention is reproduced in I-ACHR, HANDBOOK, *supra* note 4, at 44. For an analysis of the Convention, see Fox, *The American Convention on Human Rights and Prospects for United States Ratification*, 3 HUMAN RIGHTS 243 (1973); Thomas & Thomas, *Human Rights and the Organization of American States*, 12 SANTA CLARA LAW. 319, 349-74 (1972); Buergenthal, *The American Convention on Human Rights: Illusions and Hopes*, 21 BUFFALO L. REV. 121 (1971). See also SOHN & BUERGENTHAL, *supra* note 16, at 1356-74.

<sup>32</sup> The Convention was ratified by Costa Rica in 1970 and by Colombia in 1973.

<sup>33</sup> OAS Charter, Art. 112.

<sup>34</sup> OAS Charter, Art. 150.

<sup>35</sup> This conclusion finds some support in the extremely sparse *travaux préparatoires* relating to the human rights provisions found in the revised OAS Charter. See *Acta de la Decima Sesión de la Comisión "B," Third Special Inter-American Conference, Buenos Aires, Argentina, February 15-27, 1967*, OAS OFF. REC., OEA/Ser.E/XIV.1, Doc. 63, at 32-37 (1967). See also, INTER-AMERICAN INSTITUTE OF INTERNATIONAL LEGAL STUDIES, *supra* note 17, at 317.



all provisions of the Statute not in conflict with the Charter have become for the time being an integral part of the Charter.<sup>36</sup>

A number of specific legal consequences can be deduced from the revision of the OAS Charter and the conclusion that it incorporates the Statute of the Commission by reference. First, Article 51 of the Charter supersedes Article 1 of the Statute and transforms the Commission from an "autonomous entity" of the OAS into one of its principal organs. Second, the Commission now derives its existence as well as its powers from a duly ratified multilateral treaty. It cannot consequently be abolished nor divested of its powers without an amendment of the OAS Charter. Since the powers of the Commission, particularly those set out in Articles 9 and 9 (*bis*) of its Statute, now have a treaty basis, they need no longer to be legitimated by reference to controversial theories regarding the legal effect of OAS conference resolutions. Finally, by transforming the legal status of the Commission and its Statute, the revised OAS Charter has also significantly strengthened the normative character of the American Declaration of the Rights and Duties of Man.

In analyzing the changed status of the American Declaration, it should be recalled that Article 2 of the Statute provides that "for purposes of this Statute, human rights are understood to be those set forth" in the American Declaration. This provision must be read together with Article 150 of the OAS Charter which requires the Commission to "keep vigilance over the observance of human rights." The OAS Charter does not, however, define "human rights." Therefore, since Article 150 incorporates the provisions of the Statute by reference, "human rights" within the meaning of Article 150 are those "set forth" in the American Declaration. The human rights provisions of the American Declaration can today consequently be deemed to derive their normative character from the OAS Charter itself. This means, at the very least, that until the American Convention enters into force, the Commission is empowered by the OAS Charter to judge the conduct of its member states by holding them to the standards articulated in the American Declaration.<sup>37</sup>

<sup>36</sup> Although this subject seems never to have been systematically analyzed or formally acted upon by the Inter-American Commission on Human Rights, some of its members have expressed views similar to those advanced herein. See Carlos A. Dunshee de Abranches, *Work of the Inter-American Commission on Human Rights in Accordance with the Protocol of Buenos Aires*, OAS OFF. REC. OEA/Ser.L/V/II.23, Doc. 25 (English) Rev. 1 (1970); I-ACHR, *Report on the Work Accomplished During its Twenty-Fourth Session, October 13-22, 1970*, OAS OFF. REC. OEA/Ser.L/V/II.24, Doc. 32 (English) Rev. Corr., at 37-40 (1971); I-ACHR, *Report on the Work Accomplished During its Twenty-Sixth Session, October 27-November 4, 1971*, OAS OFF. REC., OEA/Ser.L/V/II.26, Doc. 37 (English) Rev. 1, at 42-44 (1972).

<sup>37</sup> Cf. I-ACHR, *Report on the Status of Human Rights in Chile*, *supra* note 27, where the Commission, after finding that the Government of Chile has violated various provisions of the American Declaration, looks to Article 27 of the American Convention on Human Rights to support its conclusion that even a national emergency does not permit a state to violate some of these rights. Interestingly enough, the Commission justifies its reliance on the "derogation clause" of the unratified American Convention (the American Declaration does not have a comparable clause) by noting that "with respect to American international law—which is the normative system that the Com-

## IV.

## CONCLUSION

The revised OAS Charter has established a treaty-based inter-American system for the promotion and protection of human rights. Today the Inter-American Commission on Human Rights derives its powers directly from the Charter. As an organ of the OAS, the Commission has acquired incontrovertible institutional legitimacy in the inter-American system, a status it lacked before the amendment of the Charter. Most importantly, the Commission now has a solid constitutional basis for the exercise of its powers and for applying the American Declaration of the Rights and Duties of Man. These developments have greatly strengthened the legal authority of the decisions of the Commission and no doubt also enhance their political significance.

The Commission has not thus far thoroughly assessed the legal and political significance of its changed status. Such an assessment is urgently needed, if only because it is not widely known within the inter-American system that the "Protocol of Buenos Aires" has effected a fundamental constitutional transformation of inter-American human rights law and institutions. The sooner the Commission itself fully understands these changes and begins to educate the OAS community to them, the faster it will be able to make some progress in bringing about the implementation of human rights in the Americas.

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mission must take primarily into account—it must be understood that, in the absence of conventional standards in force in this area, the 'most accepted doctrine' is that which is set forth in the American Convention. . . ." *Id.* at 2-3. This theory applies with even greater force to the American Declaration and the Commission's reliance on it in cases like those involving the Government of Chile.

## EDITORIAL COMMENTS

### THE GRAVEL AMENDMENT TO THE TRADE REFORM ACT OF 1974: CONGRESS CHECKMATES A PRESIDENTIAL LUMP SUM AGREEMENT

Although the Jackson Amendment to the Trade Reform Act of 1974 has monopolized public attention, a lesser-known legislative rider to the same statute sponsored by the junior Senator from Alaska warrants equal attention from international lawyers, especially ones concerned with the foreign relations law of the United States. This provision—the Gravel Amendment<sup>1</sup>—effectively blocked a lump sum agreement initiated by the United States and Czechoslovakia in July 1974 which sought to settle the claims of U.S. nationals arising from Czechoslovakia's postwar nationalization program.<sup>2</sup> While Congress's blowing the whistle on the Executive's negotiation of yet another unsatisfactory lump sum agreement<sup>3</sup> was a sport, in that the opportunity arose under a unique fact pattern unlikely to occur again, its long-overdue reassertion of an active role in the international claims settlement process certainly is a welcome sign. Moreover, for political and possibly constitutional reasons, this action by Congress has a significance that goes well beyond the pending Czech Agreement, a significance the Executive can ignore in future situations only at some risk.

#### I.

##### BACKGROUND OF THE PENDING CZECH AGREEMENT

Immediately after World War II, Czechoslovakia launched an extensive nationalization program which culminated in the taking of most U.S. owned property.<sup>4</sup> Although promising to pay just compensation early on,<sup>5</sup> a promise that it reiterated periodically right up to the Communist coup

<sup>1</sup> Trade Act of 1974, Pub. L. No. 93-618, §408, 88 Stat. 2064 (Jan. 3, 1975).

<sup>2</sup> On July 5, 1974, Czechoslovakia and the United States reached preliminary agreement on such a settlement. See N.Y. Times, July 6, 1974, at 5, col. 1; The Daily Telegraph (London), July 7, 1974, at 7, col. 6 (QE2 ed.).

<sup>3</sup> The last such settlement being the Agreement with Hungary, March 6, 1973, [1973] 1 UST 522, TIAS No. 7569, 1 R. LILICH & B. WESTON, INTERNATIONAL CLAIMS: THEIR SETTLEMENT BY LUMP SUM AGREEMENTS 324 (1975). See Lillich, *The United States-Hungarian Claims Agreement of 1973*, 69 AJIL 534 (1975).

<sup>4</sup> See Rado, *Czechoslovak Nationalization Decrees: Some International Aspects*, 41 *id.* 795 (1947). See also Doman, *Postwar Nationalization of Foreign Property in Europe*, 48 COLUM. L. REV. 1125, 1143-46 (1948); *id.*, *Compensation for Nationalized Property in Post-War Europe*, 3 INT. L. Q. 323, 332-35 (1950); and Drucker, *The Nationalisation of United Nations Property in Europe*, in 36 TRANSACT. GROT. SOC'Y 75, 87-89 (1951).

<sup>5</sup> See [1945] 4 FOREIGN REL. U.S. 478 (1968).

d'état in 1948,<sup>6</sup> Czechoslovakia never did, despite the receipt of massive aid and credits from the United States.<sup>7</sup> During the 1950's, with Czechoslovakia still refusing to compensate claimants, the United States resorted to self-help, vetoing the release of 18.4 metric tons of Nazi-looted Czech gold and seizing and selling for \$9 million a steel mill ordered and paid for by the Czechs.<sup>8</sup> Finally, in 1958, Congress enacted Title IV of the International Claims Settlement Act, authorizing the use of the proceeds from the sale of the steel mill to make pro rata payments to claimants obtaining adjudicated awards from the Foreign Claims Settlement Commission (FCSC).<sup>9</sup>

In a four-year period ending September 15, 1962, the FCSC received and determined, "in accordance with applicable substantive law, including international law,"<sup>10</sup> the validity and amount of 4,024 claims against Czechoslovakia.<sup>11</sup> It rendered 2,630 awards amounting to \$113,645,205.41, including \$72,614,634.34 in principal and \$41,030,571.07 in interest.<sup>12</sup> Since only \$8,540,768.41 remained in the Czechoslovakian Claims Fund after the payment of administrative expenses,<sup>13</sup> claimants holding awards over \$1,000 received only 5.3 percent of their awards.<sup>14</sup> Thereupon the United

<sup>6</sup> See *id.* at 420-557 *passim*; [1946] 6 FOREIGN REL. U.S. 178-241 *passim* (1969); and [1947] 4 FOREIGN REL. U.S. 193-255 *passim* (1972). Czechoslovakia's clearest commitment to pay compensation is found in Paragraph 7 of the Agreement with Czechoslovakia relating to Commercial Policy, Nov. 14, 1946, 61 Stat. (3) 2431, TIAS No. 1569, 6 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES 1776-1949, at 1314, 1315-16 (1971):

The Government of the United States and the Government of Czechoslovakia will make adequate and effective compensation to nationals of one country with respect to their rights or interests in properties which have been or may be nationalized or requisitioned by the Government of the other country. In this connection, the Government of the United States has noted with satisfaction that negotiations concerning compensation on account of such claims will shortly begin in Praha.

<sup>7</sup> Such aid and credits totaled at least \$191 million. SENATE COMM. ON FINANCE, TRADE REFORM ACT OF 1974, S. REP. NO. 93-1298, 93d Cong., 2d Sess. 216 (1974) [hereinafter cited as SENATE REPORT]. For an earlier breakdown, see Telegram from Ambassador Steinhardt to the Secretary of State, [1946] 6 FOREIGN REL. U.S. 209 (1969):

As the \$20,000,000 cotton credit, \$50,000,000 surplus war material credit, \$2,500,000 American relief for Zecho, \$2,000,000 American Red Cross, \$1,000,000 Catholic welfare and \$275,000,000 UNRRA gift have been made available without any move by Zecho Government other than vague general promises to compensate American citizens for their properties which have been nationalized, I am disturbed at the prospect of our last trump, the \$50,000,000 reconstruction loan, being played before we have a definite commitment from the Czechs that adequate and effective compensation means to them what it means to us.

<sup>8</sup> SENATE REPORT 215.

<sup>9</sup> International Claims Settlement Act of 1949, *as amended*, 72 Stat. 527 (1958), 22 U.S.C. §1642a (1970).

<sup>10</sup> International Claims Settlement Act of 1949, *as amended*, 72 Stat. 528 (1958), 22 U.S.C. §1642c (1970).

<sup>11</sup> For the leading decisions under the Czech Claims Program, see FCSC, DEC. & ANN. 379-455 (1968).

<sup>12</sup> *Id.* at 379.

<sup>13</sup> *Id.*

<sup>14</sup> Under the provisions of Title IV, the principal amounts of awards under \$1,000 were paid in full, plus 5.3 percent of the principal amounts of awards in excess thereof. Doman, *Remarks*, 58 ASIL PROCEEDINGS 53 (1964).

States began negotiations with Czechoslovakia in an effort to obtain as much of the balance of their adjudicated awards as possible.

In late 1963, when it appeared that the Executive was prepared to waive the above claims against Czechoslovakia in return for its payment of an additional \$15 million,<sup>15</sup> the late Senators Keating and Douglas introduced a "sense-of-Congress" resolution "to require Senate ratification [*sic*] of any claims agreement made with foreign nations for claims adjudicated by the Foreign Claims Settlement Commission."<sup>16</sup> Although conceding that the resolution was not legally binding upon the President,<sup>17</sup> Senator Keating argued the need to demonstrate "to the State Department through this and other methods that we will not tacitly accept the seizure of U.S. property overseas and then settle for a mere pittance of the true value. This measure should appreciably strengthen the hand of our Government in all such negotiations, by giving the Senate an opportunity to pass on claims settlements before they go into effect."<sup>18</sup> The Keating Resolution, opposed by the Department of State,<sup>19</sup> never was enacted into law, but neither was the \$15 million settlement concluded.

## II.

### CONTROVERSY OVER THE PENDING CZECH AGREEMENT

Over a decade after the introduction of the Keating Resolution, the Executive initialed a draft lump sum agreement in Prague on July 5, 1974.<sup>20</sup> Although not officially published, the pending agreement apparently provides that:

1. The United States should immediately release to Czechoslovakia the 18.4 tons of gold and all other blocked assets it has been holding as security for Czechoslovakia's payment of the \$105 million expropriation debt.

<sup>15</sup> N.Y. Times, Jan. 7, 1965, at 8, col. 5.

<sup>16</sup> 109 CONG. REC. 25148 (1963). S. 2405, 88th Cong., 1st Sess. (1963), was designed to amend Section 4 of Title I of the International Claims Settlement Act of 1949 by adding the following subsection:

(k) It is the sense of the Congress that any agreement hereafter entered into between the Government of the United States and any foreign government relating to the settlement of claims, determined or in the process of determination by the Foreign Claims Settlement Commission, by nationals of the United States against such foreign government shall be submitted to the Senate for its advice and consent.

*Id.* at 25149.

<sup>17</sup> *Id.* at 21593. Compare text at and accompanying notes 65-69 *infra*.

<sup>18</sup> *Id.* at 25149. "What is more, even the Czechs, who now plead poverty, might think twice if they expected such an argument to be weighed by the Senate, which is well aware of Czech foreign aid to Cuba and other nations around the world." *Id.* at 21592.

<sup>19</sup> "I am sure the State Department is opposed to the amendment, because it does not want any interference in regard to the amount for which it can settle such claims of U.S. citizens against other countries." *Id.* at 21593. Compare text at note 56 *infra*.

<sup>20</sup> See note 2 *supra*.

2. Czechoslovakia's \$105 million expropriation debt to citizens of the United States should be fully and finally settled for only \$20.5 million, such sum to be paid in installments over the next 12 years.

3. Upon passage of [the Trade Reform Act of 1974], Czechoslovakia would be eligible to apply for most-favored-nation treatment under our tariff laws and for extension of . . . other important economic benefits. . . .<sup>21</sup>

While the amount of compensation payable by Czechoslovakia under the above arrangement is roughly one-third more than the amount contemplated a decade ago,<sup>22</sup> this increase is more than offset by the additional passage of time. Thus, from the perspective of U.S. claimants, the pending agreement is even less satisfactory than the earlier effort which provoked the Keating Resolution.<sup>23</sup>

Fortunately for the claimants, who in the normal course of events would have been faced with a *fait accompli*, the pending agreement, unlike other postwar lump sum settlements concluded by the United States, involves the granting of *quid pro quos* which require congressional approval. In the first place, the agreement apparently is conditioned upon the U.S. granting most-favored-nation treatment and other economic benefits to Czechoslovakia,<sup>24</sup> the bestowal of which by the Executive requires prior congressional authorization. The Executive, therefore, had little choice in the case of the pending agreement but to seek such authorization, which it hoped to obtain under the blanket provisions found in Title IV of the bill that eventually became the Trade Reform Act of 1974.<sup>25</sup> Thus Congress

<sup>21</sup> SENATE REPORT 216.

<sup>22</sup> See text at note 15 *supra*.

<sup>23</sup> Extended discussion of the *merits* of the pending agreement is beyond the scope of this Editorial, which is concerned primarily with the *process* by which such lump sum agreements are concluded by the United States. In brief, though, the Department of State, claiming a 42 percent return thereunder, argues that "[i]t is the most favorable settlement we have concluded with any Eastern European country during the postwar period." Statement of Robert S. Ingersoll, Deputy Secretary of State, before the Senate Finance Committee, September, 1974 (unpublished). These contentions, according to a claimant's attorney, "are patently false." Statement of Edward L. Merrigan, Attorney for Aris Gloves, Inc., before the Senate Finance Committee, September, 1974 (unpublished). Accord, SENATE REPORT 217 (above contentions are "simply not true"). From an examination of available data, it is apparent that the Department of State greatly overstated its case, for the return actually is nowhere near 42 percent, and would be one of the lowest—if indeed not the lowest—obtained by the United States under its postwar lump sum agreements.

<sup>24</sup> See text at note 21 *supra*. In the past, the United States has refused to condition lump sum agreements upon the granting of such *quid pro quos*. Note, however, that in the recent Agreement with Hungary, note 3 *supra*, the United States agreed in Annex F to seek authority from Congress to extend most-favored-nation treatment to Hungary, a commitment which if not fulfilled apparently allows Hungary to suspend payments thereunder. See Lillich, *supra* note 3, at 557.

<sup>25</sup> Trade Act of 1974, Pub. L. No. 93-618, §§401-409, 88 Stat. 2056 (Jan. 3, 1975).

Title IV of the Act authorizes the President to extend, under certain circumstances, most-favored-nation (nondiscriminatory) trade concessions to countries whose products do not currently receive such treatment. The only countries not now receiving nondiscriminatory treatment in the U.S. market are the communist nations

was presented with the unique opportunity of putting conditions on Czechoslovakia's coverage under Title IV and, by so doing, effectively vetoing the pending agreement in the absence of compliance with those conditions. Secondly, although the Executive could have authorized the release of the 18.4 metric tons of Nazi-looted Czech gold, held by the Tripartite Commission for the Restitution of Monetary Gold established under the Paris Reparations Agreement of 1946,<sup>26</sup> without congressional authorization,<sup>27</sup> prior to such Executive action—delayed by the need to obtain congressional approval of the first *quid pro quo*—Congress presumably possessed the power in this “twilight” area to lay down conditions governing that release.

In the event, Senator Gravel introduced an amendment to Title IV providing that “Czechoslovakia, which owes U.S. citizens a balance of \$105 million for expropriation of their properties in the late 1940's, would not become eligible for most-favored-nation treatment, or for U.S. loans or credits, or for the release of certain gold the U.S. Government has been holding as security for the payment of that expropriation debt, until that country first pays at least the principal amount it owes U.S. citizens (\$64 million).”<sup>28</sup> The Senate Finance Committee, noting that most-favored-nation treatment “could result in new trade for Czechoslovakia worth hundreds of millions of dollars a year”<sup>29</sup> and that the Czech gold “has increased in market value from \$20 million in 1946 to approximately \$100 million in 1974,”<sup>30</sup> found the compensation provided for in the pending agreement “completely unacceptable”<sup>31</sup> and, anxious to obtain more ade-

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(with the exception of Poland and Yugoslavia, whose products do receive such treatment).

STAFFS OF SENATE COMM. ON FINANCE AND HOUSE COMM. ON WAYS AND MEANS, 93RD CONG., 2D SESS., TRADE ACT OF 1974, at 17 (Comm. Print 1974).

<sup>26</sup> To implement Part III of the Paris Reparations Agreement, Jan. 14, 1946, 4 C. BEVANS, TREATIES AND OTHER INTERNATIONAL AGREEMENTS OF THE UNITED STATES OF AMERICA 1776-1949, at 5, 17-18 (1970), France, Great Britain, and the United States established the Tripartite Commission for the Restitution of Monetary Gold on September 27, 1946. 15 DEPT. STATE BULL. 563 (1946). The bulk of Nazi-looted gold under its jurisdiction was restored to its rightful national owners long ago, but 18.4 tons belonging to Czechoslovakia has been withheld at the behest of the United States pending the conclusion of a satisfactory lump sum agreement. SENATE REPORT 215. See Int. Herald-Tribune, Dec. 18, 1974, at 2, cols. 2-4.

<sup>27</sup> The Executive had not sought congressional authorization to release non-Czech gold in the past. Cf. the Aide-Memoire to the Agreement with Yugoslavia of 1948, July 19, 1948, 62 Stat. 2658, TIAS No. 1803, 2 R. LILICH & B. WESTON, *supra* note 3, at 10, by which the Executive released Yugoslav gold reserves in the United States as part of that lump sum agreement.

<sup>28</sup> SENATE REPORT 214-15.

<sup>29</sup> *Id.* at 216.

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

One-sided agreements of this nature are especially dangerous to the United States and its citizens at this particular time in history when nations in various parts of the world are threatening to expropriate or nationalize U.S. properties worth billions of dollars, while other nations have already taken valuable U.S. holdings

quate funds for claimants, promptly approved the amendment.<sup>32</sup> Subsequently, Senator Gravel introduced a second amendment to the bill, approved by the full Senate, permitting the use of the Czech gold to pay claimants the principal amount of their awards if Czechoslovakia failed to do so.<sup>33</sup>

When the Conference Committee considered Title IV, it retained the gist of Senator Gravel's first amendment, with one significant modification, but rejected his second amendment entirely.<sup>34</sup> As enacted into law, Section 403 of the Trade Reform Act of 1974 (The Gravel Amendment) provides that:

(a) The arrangement initialed on July 5, 1974, with respect to the settlement of the claims of citizens and nationals of the United States against the Government of Czechoslovakia shall be renegotiated and shall be submitted to the Congress as part of any agreement entered into under this title with Czechoslovakia.

(b) The United States shall not release any gold belonging to Czechoslovakia and controlled directly or indirectly by the United States pursuant to the provisions of the Paris Reparations Agreement of January 24, 1946, or otherwise, until such agreement has been approved by the Congress.<sup>35</sup>

In brief, the amendment directs the President, supposedly through officials "other than those who negotiated the unreasonable first tentative

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without the payment of just compensation. The United States simply cannot afford to proclaim in the face of this trend that expropriations of U.S. properties will quickly be forgotten if the taking nation ultimately offers a relative pittance in return.

*Id.* at 217.

<sup>32</sup> As the Committee pointed out, the amendment "does not prohibit the granting of most-favored-nation status or other economic benefits to [Czechoslovakia]. Rather, it provides that those benefits may be extended, but only after Czechoslovakia first pays at least the principal amount (\$64 million) owed on its outstanding \$105 million expropriation debt." *Id.* See text at notes 12-13 and 28 *supra*. In effect, the amendment merely preserves the status quo ante pending agreement.

<sup>33</sup> 120 CONG. REC. S21445-46 (daily ed. Dec. 13, 1974). The second amendment goes well beyond its author's first one, in that it does not just preserve the status quo ante pending agreement but provides a source of funds to compensate U.S. claimants even if Czechoslovakia refuses to conclude a lump sum agreement on the terms laid down by Congress.

The Department of State had maintained that "[w]e have no legal authority to vest and sell the gold to satisfy domestic claimants and we have no legal way to attain that authority." Statement of Robert S. Ingersoll, note 23 *supra*. Note, however, that 16 years earlier it had had no such difficulty with respect to the vesting and selling of a Czech steel mill for the identical purpose. See text at notes 8-9 *supra*. On the use of self-help in such situations, see Christenson, *The United States-Rumanian Claims Settlement Agreement of March 30, 1960*, 55 AJIL 617, 636 (1961).

<sup>34</sup> In view of Czechoslovakia's subsequent refusal to renegotiate the pending agreement (see text at notes 43-44 *infra*), further legislative attempts to use the Czech gold to compensate claimants can be anticipated.

<sup>35</sup> See note 1 *supra*.



agreement,"<sup>36</sup> to renegotiate "a more equitable claims settlement"<sup>37</sup> as a condition precedent to the granting of most-favored-nation treatment, the extension of other economic benefits, and the release of the Czech gold.<sup>38</sup> While the requirement that the renegotiated agreement provide U.S. claimants with payment in full of the principal amount of their awards has been deleted<sup>39</sup>—the significant modification mentioned above, which wisely introduces an element of flexibility into the amendment<sup>40</sup>—clearly it is Congress's intention that the new negotiators come as close as possible to this goal.<sup>41</sup> In any event, Congress has reserved the right to pass upon the adequacy of compensation obtained under the renegotiated agreement when it is submitted for its approval.<sup>42</sup> Such submission apparently will not occur in the near future, however, since Czechoslovakia, fulfilling the

<sup>36</sup> CONFERENCE REPORT, TRADE ACT OF 1974, H.R. REP. NO. 93-1644, 93d Cong., 2d Sess. 49 (1974).

<sup>37</sup> *Id.*

<sup>38</sup>

Under the Act, the President is directed to renegotiate the agreement with Czechoslovakia on the settlement of U.S. claims. There must be a full and fair settlement before most-favored-nation treatment will be granted. Czechoslovakian gold held by the United States will remain in the United States until a settlement is negotiated and submitted to Congress as part of any bilateral commercial agreement with Czechoslovakia. Both must be approved by both Houses of Congress before nondiscriminatory treatment and credits may be extended.

STAFFS OF SENATE COMM. ON FINANCE AND HOUSE COMM. ON WAYS AND MEANS, *supra* note 25, at 19.

<sup>39</sup> Newspaper accounts have not picked up this important point. See, e.g., Wash. Post, Jan. 17, 1975 at A18, col. 3: "When the trade bill was passed in December, it contained an amendment . . . requiring that Czechoslovakia pay U.S. claims in full before the gold could be returned and most-favored-nation status granted." See also N.Y. Times, Aug. 6, 1975, at 2, col. 4.

<sup>40</sup> Requiring the Executive to seek payment in full of the principal amount of the FCSC's adjudicated awards would have placed a heavy burden upon the Department of State, since, with all due respect to the FCSC's decisionmaking process, there is no reason why Czechoslovakia should be expected to accept automatically the unilateral determination by the United States of the validity and amount of each and every claim. See generally R. LILICH, *THE PROTECTION OF FOREIGN INVESTMENT: SIX PROCEDURAL STUDIES* 180-81 (1965).

It is worth noting that the Keating Resolution also took a flexible approach in this regard. According to its co-sponsor, the late Senator Douglas:

I do not think this amendment interferes improperly with the responsibilities of the Department of State. We do not ask for a 100 percent settlement, merely for Senate review of the settlement the State Department asks that we accept. Perhaps a case can be made that other considerations among the issues at stake justify a less than 100 percent settlement. But in a case in which the decision of the responsible agency [the FCSC] is threatened with almost complete contradiction by another agency, I think we can properly insist on Senate review to provide an opportunity for the protection of legitimate interests of citizens.

109 CONG. REC. 21594 (1963).

<sup>41</sup> See the references to "a more equitable" and "a full and fair" settlement agreement contained in the text at note 37 and accompanying 38 *supra*.

<sup>42</sup> See text at note 35 and accompanying note 38 *supra*. In this respect, the Gravel Amendment goes beyond the Keating Resolution, which would have required only the Senate's advice and consent. See text at and accompanying note 16 *supra*.

Department of State's prophecy in this regard,<sup>43</sup> has announced that it will not renegotiate the pending agreement to satisfy the "political conditions" contained in the amendment.<sup>44</sup>

### III.

#### RAMIFICATIONS OF THE GRAVEL AMENDMENT

Although the Gravel Amendment effectively blocks only the pending Czech Agreement, its political and possibly constitutional ramifications are much wider. The amendment, in short, is not just a petulant response by a particular Congress to an especially unsatisfactory lump sum agreement, but rather a *cri de coeur* from a long-neglected Legislative branch anxious at last to play its rightful coordinate role in the international claims settlement process. If the Executive continues to ignore such manifestations of concern, the likelihood is that it will provoke congressional efforts to limit or restrict its executive agreement-making power in this area.<sup>45</sup> Such efforts would become unnecessary if the Executive, in its future negotiation of settlement agreements, harked back to certain fundamental principles of constitutional law and practice.

There is no doubt, of course, that the President possesses the power to settle the claims of U.S. nationals against foreign countries.<sup>46</sup> Moreover, at least since the case of the "Wilmington Packet" in 1799, Presidents have claimed the right to settle them by executive agreement.<sup>47</sup> Accord-

<sup>43</sup>

It is our firm conviction that [the Gravel Amendment] would not bring the Czechoslovaks promptly back to the negotiating table. We do not believe that the Czechoslovak Government would, in the foreseeable future, be willing to participate in new negotiations on the claims, particularly if they knew in advance that we would demand settlement in full of the claims in order to have the gold returned. . . . In our judgment they would react sharply and negatively if we repudiate the initialled settlement.

Statement of Robert S. Ingersoll, note 23 *supra*.

<sup>44</sup> Wash. Post, Jan. 17, 1975, at A18, cols. 1-3. See also Letter from Ambassador Spacil to the Editor, Wash. Post, Feb. 14, 1975, at A31, cols. 4-6. On the worsening of Czech-United States relations in recent months, see Int. Herald-Tribune, June 7-8, 1975, at 5, cols. 5-8. This situation, of course, cannot be attributed exclusively to the effect of the Gravel amendment. N.Y. Times, Aug. 15, 1975, at 2, cols. 4-5.

<sup>45</sup> See text at and accompanying notes 65-69 *infra*.

<sup>46</sup> "That the President's control of foreign relations includes the settlement of claims is indisputable." *United States v. Pink*, 315 U.S. 203, 240 (1942) (Frankfurter, J., concurring). Cf. Moore, *Treaties and Executive Agreements*, 20 POL. SCI. Q. 385, 403 (1905) (emphasis added): "[P]ecuniary claims against foreign governments have constantly been settled by the president, and no question as to his possession of such a power, apart from discussions as to its possible limitations, appears ever to have been seriously raised."

<sup>47</sup> "The case of the 'Wilmington Packet' set a precedent which was to be followed in a long line of subsequent claims, settlement of which has been sought by the authority of the Executive alone." W. McCURE, *INTERNATIONAL EXECUTIVE AGREEMENTS* 44 (1941). See generally E. CORWIN, *THE PRESIDENT'S CONTROL OF FOREIGN RELATIONS* 119 (1917); J. MATHEWS, *AMERICAN FOREIGN RELATIONS: CONDUCT AND POLICIES* 543 (rev. ed. 1938); and Q. WRIGHT, *THE CONTROL OF AMERICAN FOREIGN RELATIONS* 244 (1922).

ing to McClure, during the period 1817-1917 "no fewer than eighty executive agreements were entered into by the United States looking toward the liquidation of claims of its citizens. . . ." <sup>48</sup> On the other hand, numerous settlement agreements during the nineteenth century also took the form of treaties, <sup>49</sup> and, despite occasional statements to the effect that Senate approval never was necessary, <sup>50</sup> that form of international agreement-making probably predominated. <sup>51</sup> Indeed, in so far as major lump sum agreements are concerned, 15 of the 17 concluded prior to World War II actually were submitted to the Senate for its advice and consent. <sup>52</sup> Thus regal statements to the effect that "[i]t has not been the practice of the Department of State to obtain the approval of the Senate for the settlement of international claims," <sup>53</sup> to the extent that they have any validity at all, must be limited to post-World War II practice. <sup>54</sup>

<sup>48</sup> W. McCLURE, *supra* note 47, at 53. See generally 14 M. WHITEMAN, *DIGEST OF INTERNATIONAL LAW* 247 (1970): "A large number of executive agreements have been concluded for the settlement of claims of American nationals against foreign governments."

<sup>49</sup> Moore, *supra* note 46, at 399-403, whose examples include many lump sum agreements.

<sup>50</sup> 'In 1859 Secretary [of State] Cass took occasion to declare that it was not necessary to submit claims conventions to the Senate." W. McCLURE, *supra* note 47, at 44, citing 2 G. HAYNES, *THE SENATE OF THE UNITED STATES: ITS HISTORY AND PRACTICE* 643 (1938), who notes that despite Cass's comment "that continued to be the general practice prior to 1870." See text at note 51 *infra*.

In 1860 President Buchanan, in submitting to the Senate "an agreement with Venezuela, signed January 14, 1859, for the settlement of claims of citizens of the United States as the result of their expulsion by the Venezuelan authorities from the Aves Island, said: 'Usually it is not deemed necessary to consult the Senate in regard to similar instruments relating to *private claims of small amount when the aggrieved parties are satisfied with their terms.*'" S. CRANDALL, *TREATIES: THEIR MAKING AND ENFORCEMENT* 108 (2d ed. 1916) (emphasis added). Under this settlement agreement, found in 2 W. MALLOY, *TREATIES, CONVENTIONS, INTERNATIONAL ACTS, PROTOCOLS AND AGREEMENTS BETWEEN THE UNITED STATES OF AMERICA AND OTHER POWERS* 1776-1909, at 1843 (1910), Venezuela paid the United States \$130,000 in satisfaction of five claims.

<sup>51</sup> See text accompanying note 50 *supra*. See also Moore, *supra* note 46, at 399: "Such an agreement the president no doubt may in any case submit to the Senate, if he sees fit to do so; and we find, especially in former times, that this course was often taken."

<sup>52</sup> See R. LILICH, *INTERNATIONAL CLAIMS: THEIR ADJUDICATION BY NATIONAL COMMISSIONS* 7-9 (1962).

<sup>53</sup> 14 M. WHITEMAN, *supra* note 48, at 247. Such statements are in marked contrast to earlier assertions by the Department of State, which were far less dogmatic and much more sensitive to the need for Executive self-restraint in this "twilight" area. See text accompanying note 50 *supra*. See also S. CRANDALL, *supra* note 50, at 108: "Agreements for the adjustment or settlement or pecuniary claims of citizens against foreign governments, *which meet with the approval of the claimants*, . . . are not usually submitted to the Senate." (Emphasis added).

<sup>54</sup> Since World War II the Executive has relied almost exclusively upon the executive agreement as the vehicle for settling claims against foreign countries. For the last major lump sum agreement submitted to the Senate for its advice and consent, see Agreement with Panama, Jan. 26, 1950, [1950] 1 UST 685, TIAS No. 2129, 2 R. LILICH & B. WESTON, *supra* note 3, at 35.

This postwar trend toward near exclusive Executive control over the international claims settlement process is the product of several factors.<sup>55</sup> In the first place, if executive agreements and treaties are interchangeable devices for settling international claims, superficially at least the Executive in these busy times has little to gain and a lot to lose by going the treaty route. "A President or Secretary of State seldom wishes to run the gauntlet of the Senate unless necessary," observes Mathews, since "he is likely to have found by experience that consulting the upper house jeopardizes the success of the project, and he may consequently be minded to rely as largely as possible upon executive agreements in lieu of treaties."<sup>56</sup> Secondly, with rare exceptions,<sup>57</sup> Congress has abdicated its responsibilities in the process of claims settlement. Thus even the author of the recent Case Act,<sup>58</sup> which requires the transmittal to Congress of international agreements other than treaties, has remarked casually that "I am not really concerned about that matter."<sup>59</sup> Finally, the principal beneficiaries of the settlement agreements—U.S. claimants—unfortunately are looked upon more as charitable cases than as persons deprived of valuable rights and hence legally entitled to just compensation.<sup>60</sup> If one regards a settlement agreement, no matter how poor, as a "windfall" to claimants,<sup>61</sup> one obviously has little reason to concern oneself with how it has been achieved.

The Gravel Amendment hopefully portends a change of attitude across the board. Congress, on its part, has aroused itself from its attitude of benign neglect, and, at the very least, the Executive has been sensitized to the fact that it no longer can overlook the interests of claimants in its desire to achieve other foreign policy objectives vis-à-vis foreign countries. After all, even McClure, the staunchest supporter of executive agreements, readily admitted that it is "no small thing for the President, acting thus on his own responsibility, to conclude a matter affecting so closely the

<sup>55</sup> The trend, incidentally, is exactly the opposite of the one described by McDougal in his classic work. "The notion that the Executive has exclusive control over the settlement of international private claims has, however, yielded in favor of a doctrine of coordinate control, with primary presidential responsibility." M. McDOUGAL & ASSOCIATES, *STUDIES IN WORLD PUBLIC ORDER* 491 n.167 (1960). When and where the notion has yielded is left unsaid. Certainly this writer has seen little evidence of an emerging "doctrine of coordinate control" during the twentieth century, much less during the postwar period.

<sup>56</sup> J. MATHEWS, *supra* note 47, at 546-47. In this regard, at least three treaties dealing with claims have been rejected by the Senate and returned to the President. 2 G. HAYNES, *supra* note 50, at 630 n.1.

<sup>57</sup> The ill-fated Keating Resolution being a rare effort to reassert Congress's responsibilities in this area. See text at notes 15-19 *supra*.

<sup>58</sup> 1 U.S.C. §1126 (Supp. III 1974).

<sup>59</sup> *Hearings on S. 596 Before the Senate Comm. on Foreign Relations*, 92d Cong., 1st Sess. 74 (1971).

<sup>60</sup> On the question of just what constitutes just compensation, see generally 1-3 *THE VALUATION OF NATIONALIZED PROPERTY IN INTERNATIONAL LAW* *passim* (R. Lillich ed. & contrib. 1972-1975).

<sup>61</sup> Comment, *Blocked Assets and Private Claims: The Initial Barriers to Trade Negotiations Between the United States and China*, 3 GA. J. INT. & COMP. L. 449, 455 (1973).

fortunes of individual citizens.”<sup>62</sup> With lump sum agreements involving China and Cuba awaiting negotiation,<sup>63</sup> the Executive would do well to rethink its recent near exclusive reliance upon executive agreements and return, at least in cases of major concern, to its prior practice of seeking formal Senate approval of lump sum settlements.<sup>64</sup> Otherwise, absent extensive and genuine consultations which might make the “doctrine of coordinate control”<sup>65</sup> a reality, another constitutional confrontation may well materialize,<sup>66</sup> bringing in its train legislative proposals requiring congressional approval of all settlement agreements.<sup>67</sup> In this regard, a recent study contends that “[t]he Congress, at least arguably, has the constitutional authority to enact legislation restricting the capacity of the President to enter into [such] executive agreements,”<sup>68</sup> and the extent of this authority soon may be tested if the lessons of the Gravel Amendment are not learned.<sup>69</sup>

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<sup>62</sup> W. McCLOURE, *supra* note 47, at 44. More recently Berger, questioning the constitutional basis of the Executive's claim “to oust Senate participation in the making of such settlement agreements,” has underscored “the confiscatory impact of such settlements on the reimbursement claims of citizens.” R. BERGER, *EXECUTIVE PRIVILEGE: A CONSTITUTIONAL MYTH* 153 (1974).

<sup>63</sup> Claims against these countries have been preadjudicated by the Foreign Claims Settlement Commission under Title V of the International Claims Settlement Act of 1949, as amended, 22 U.S.C. §1643 (1970). See Murphy, *Claims Against the Republic of Cuba*, 27 U. MIAMI L. REV. 372 (1973), and Redick, *The Jurisprudence of the Foreign Claims Settlement Commission: Chinese Claims*, 67 AJIL 728 (1973).

<sup>64</sup> See text at note 52 *supra*.

<sup>65</sup> See McDUGAL & ASSOCIATES, note 55 *supra*.

<sup>66</sup>

The recent spate of criticism of presidential usage of the executive agreement would probably mean that a decision to consummate such a transaction [a lump sum agreement with China predicated upon the utilization of blocked Chinese assets] would precipitate a congressional-executive confrontation which the President would be well-advised to avoid. If a decision to settle claims with China through a self-executing executive agreement is made, we might expect certain elements in Congress to initiate a legislative effort to define and limit the scope of the executive agreement power.

Comment, *Self-Executing Executive Agreements: A Separation of Powers Problem*, 24 BUFFALO L. REV. 137, 158 (1974).

<sup>67</sup> See text accompanying note 66 *supra*. Senator Byrd of Virginia has indicated that he intends to introduce legislation “calling for congressional approval of U.S. claims if they are settled for less than 100 cents on the dollar.” Wash. Post, Jan. 17, 1975, at A5, col. 1. Compare text at and accompanying note 40 *supra*.

<sup>68</sup> Ohly, *Advice and Consent: International Executive Claims Settlement Agreements*, 5 CALIF. WESTERN INT. L.J. 271, 273 (1975). The Congressional Research Service of the Library of Congress has acknowledged that “it would seem that Mr. Ohly's [article] arguably contains a constitutional basis upon which Congress could enact the proposed legislation.” D. Sale, *International Claims Settlement Executive Agreements*, Oct. 16, 1974 (Library of Congress, Congressional Research Service, American Law Division CRS-8).

<sup>69</sup> While the President, as matters now stand, “certainly possesses the inherent power to settle international claims by executive agreement and thus avoid the necessity of securing Senate consent,” R. LILlich, *supra* note 40, at 198, attempts to limit or restrict this power, raising acute constitutional questions, apparently are in the offing. See text at and accompanying notes 65-68 *supra*.

## THE INTERNATIONAL LAW STANDARD IN UNITED STATES STATUTES, 1953-1974

One of the most effective means for emphasizing the applicability of international law and of relating the constantly evolving body of that law to municipal law is through reference to customary international law and treaty standards in national legislation. Such references may be stated in very general terms, or there may be specific indication of the law's applicability in certain circumstances or as to stated subject matter. In previous studies, covering the period through 1953, I have called attention to the relative frequency with which the U.S. Congress has employed such a technique.<sup>1</sup> U.S. statutory pronouncements over the period from 1953 through 1974 reveal continued resort to this practice, and also some innovations.<sup>2</sup> A few examples may serve to illustrate how this device has retained its significance as a means of integrating municipal and international law and why it deserves continuing attention by international lawyers.

### I.

One purpose of legislative reference to an international law standard is to express a standard of municipal criminal or civil law liability or obligation in areas where international obligations may be relevant. This is the case, for example, with respect to legislation relating to protection of foreign officials or the personnel of public international organizations. Thus, the Congress passed an act in 1964 and broadened its scope in 1972 in order to protect foreign officials and official guests. By its provisions,

(a) Whoever assaults, strikes, wounds, imprisons, or offers violence to a foreign official or official guest shall be fined not more than \$5,000, or imprisoned not more than three years, or both. . . .

(b) Whoever willfully intimidates, coerces, threatens, or harasses a foreign official or an official guest, or willfully obstructs a foreign official in the performance of his duties, shall be fined not more than \$500, or imprisoned not more than six months, or both.<sup>3</sup>

<sup>1</sup> *The International Law Standard in Statutes of the United States*, 45 AJIL 732-40 (1951), and *The International Law Standard in Recent Statutes of the United States*, 47 *id.* 669-78 (1953). For some related issues, in the context of my discussion of the applicability of international law with respect to public relations of Commonwealth member states, see Robert R. Wilson, *The Commonwealth and the Law of Nations*, in DAVID R. DEENER and R. TAYLOR COLE (eds.), *COMMONWEALTH PERSPECTIVES* 59-85, (1958).

<sup>2</sup> Practice seems to support the view that unilateral assertion including assertion of the applicability of this law may serve a useful purpose. There is possible utility in giving weight to assertion of the law's relevance, either in general or in relation to particular subjects. See, in this connection, MORTON A. KAPLAN and NICHOLAS DEB. KATZENBACH, *THE POLITICAL FOUNDATIONS OF INTERNATIONAL LAW* 105-06, (1961).

<sup>3</sup> Act of Aug. 27, 1964, Pub. L. 88-493, 78 Stat. 610, and Act of Oct. 24, 1972, Pub. L. 92-539, §301, 86 Stat. 1072, 18 U.S.C. §112.

Another purpose of legislative reference to international law may be to attempt to control the jurisdiction or exercise of authority by coordinate branches of government. Thus, in another statute during this period, the well-known "Sabbatino Amendment," Congress sought to prevent the federal courts from declining to act, on the ground of the act of state doctrine, in cases where the claim involved a taking in violation of international law. The statute provided:

Notwithstanding any other provision of law, no court in the United States shall decline on the ground of the federal act of state doctrine to make a determination on the merits giving effect to the principles of international law in a case in which a claim or other right is asserted by any party including a foreign state (or a party claiming through such state) based upon (or traced through) such a confiscation or other taking after January 1, 1959, by an act of that state in violation of the principles of international law, including the principle of compensation and the other standards set out in this subsection:<sup>4</sup>

Still another purpose of reference to international law has been to associate or include that law with relevant national law as a standard for the determination of claims or other questions. Thus, in legislation to amend an international claims settlement act, the Congress directed that the relevant commission should "receive and determine in accord with applicable substantive law, including international law, the validity and amounts of claims of nationals of the United States against the Governments of Bulgaria, Hungary, and Rumania. . . ."<sup>5</sup>

On occasion, statutory reference to the law of nations has taken the form of assertions that there have been violations of that law. An illustration is the preamble of the famous "Tonkin Bay" joint resolution passed in 1964 in which Congress asserted that naval units of the Communist regime in Vietnam had, in violation of international law, "deliberately and repeatedly attacked United States naval vessels lawfully present in international waters. . . ."<sup>6</sup>

Reference to international law may also be in the context of assertions of sovereignty, as in the Federal Aviation Act of 1958, which provides:

The United States of America is hereby declared to possess and exercise complete and exclusive national sovereignty in the airspace of the United States, including the airspace above all inland waters and the airspace above those portions of the adjacent marginal high seas, bays, and lakes, over which by international law . . . the United States exercises national jurisdiction.<sup>7</sup>

Other legislative language may be in more general terms and the reference to international law may be implied rather than expressed. Legis-

<sup>4</sup> Act of Oct. 7, 1964, Pub. L. 88-633, 78 Stat. 1009, which became §301(d)(4) of the Foreign Assistance Act of 1964. It was reenacted in 1965 as §301(d)(2) of the Foreign Assistance Act of 1965, Pub. L. 89-171, 79 Stat. 653, and is now incorporated in 22 U.S.C. §2370(e)(2).

<sup>5</sup> Act of Aug. 9, 1955, §3, 69 Stat. 571, 22 U.S.C. §1641b, amending the International Claims Settlement Act of 1949 (22 U.S.C. §1621 *et seq.*).

<sup>6</sup> Joint Resolution of Aug. 10, 1964, Pub. L. 88-408, 78 Stat. 384.

<sup>7</sup> 72 Stat. 731, 798, 49 U.S.C. §1508(a).

lative references to law in general or, as it has on occasion been broadly phrased in a resolution, to the "framework of law and order,"<sup>8</sup> should presumably be broadly interpreted as including international law. Statutes have also referred to "any other law" and to norms "including international law."<sup>9</sup>

## II.

These examples indicate that the fact that the congressional role is associated primarily with the making of national law has not precluded assertion, in the same contexts, of the relevance of international law along with that of applicable national law. National legislative provisions have sometimes been so worded as to indicate adherence not to specifically phrased commitments but to rules of law that are broadly indicated as applicable. There continues to be observable, in the process of national statute making, a tendency to refer to "law" in general terms and to bases of settlement as including international law. These are, of course, distinguishable from statutory references to commitments such as those in bilateral or multilateral treaties or agreements. As noted above, congressional declarations of competence as to the exercise of jurisdiction by national tribunals may specify sources, some of them in broad terms of law other than national law. While national statutes in which there are references to the law of nations may have for their purpose to implement contractual commitments such as those in treaties and agreements, the making of the latter has not precluded congressional commitments adhering in general terms to the law that is international.

## III.

Statutory references to international law, such as some of those referred to above, are distinguishable from commitment to settlements based on principles comprising the charter of an international public organization. Statutes that do not in express terms refer to the law of nations may in effect, by their wording, commit parties to apply law other than that grounded in custom. Thus, in certain bilateral arrangements concerning guaranty of foreign investments (a development which is a relatively recent one in U.S. diplomacy and practice) there is no direct reference in terms to customary international law, but, instead, mention of conformity to the principles and purposes of the United Nations.

Another type of pronouncement in recent congressional legislation, apparently relatable to internationalism, had repeated expression by the Congress in the period from 1953 to 1974. A 1956 Act making appropriations for the Department of State provided:

None of the funds appropriated in this title shall be used (1) to pay the United States contribution to any international organization which

<sup>8</sup> Concurrent Resolution of June 22, 1965, 79 Stat. 1429, 1430, recognizing the twentieth anniversary of the United Nations.

<sup>9</sup> Act of Aug. 9, 1955, §3, amending §304 of the International Claims Settlement Act, 69 Stat. 572, 22 U.S.C. §1641b.



engages in the direct or indirect promotion of the principle or doctrine of one world government or one world citizenship; . . .<sup>10</sup>

Similar language has appeared in a number of congressional pronouncements since 1956.<sup>11</sup>

Some congressional language does not in terms refer to international law but is possibly relatable to that law. An example can be found in a concurrent resolution concerning Hungary. In this there was mention of "repressive" action by the Soviet Union, followed by reference to the need for "practical redress of the wrong which has been committed in violation of . . . elemental requirements of humanity."<sup>12</sup>

#### IV.

The foregoing does not, of course, purport to consider every example in the selected time period of the mention of international law in national statutes. However, it may illustrate this country's fairly frequent practice of asserting in its legislation the applicability of international law in general terms, without indicating what that law is believed to be or the manner in which it is or may become relevant.

The part which such references to international law by national legislative bodies may have in emphasizing and further strengthening public international law deserves continuing and further study. In doing so, it should be noted that a great part of the body of international law is based upon custom and that growth of customary rules tends to be slow. Of course, to provide briefly in statutory enactments that international law shall be applicable is not necessarily to furnish parties in interest with any specific assertion of what that law is understood to be on particular subjects. It is apparent that something more than general specification of international law is desirable, along with wider acceptance of the jurisdiction of international tribunals to interpret that law. Yet the continued practice of emphasizing the applicability of international law through congressional references to it in statutes, whether these be mere assertions of relevance or provisions looking to actual interpretation and application, may serve a useful purpose in the further development of the law of nations. Indeed, such pronouncements, if constructively utilized, may provide support for the gradual development of a more adequate (because more global) international judicial system.

ROBERT R. WILSON \*

<sup>10</sup> Departments of State and Justice, The Judiciary and Related Agencies Appropriations Act, 1959, §109, 70 Stat. 304.

<sup>11</sup> See various similar annual appropriation acts, through 81 Stat. 411, 415.

<sup>12</sup> Concurrent Resolution of Aug. 6, 1957, 71 Stat. B-38, B-39.

\* This is the last contribution to the *Journal* by Professor Wilson, who died on April 29, 1975, several days after having submitted this editorial comment to the *Journal*. Professor Wilson was first elected to the Board of Editors in 1937 and became an Honorary Editor in 1965. He was President of the American Society of International Law from 1957 to 1958. R.R.B.

## ENABLING THE UNITED STATES TO CONTEST "ILLEGAL" UNITED NATIONS ACTS

It is quite likely that at one of the next sessions of the General Assembly some action might be taken which the United States would like to contest on the ground that it constitutes a violation of the Charter. In the early days of the United Nations, when questions of legality arose, the United States was able to muster a majority for requesting an advisory opinion of the International Court of Justice on the subject, and the opinion of the Court was in practically every case favorable to the view taken by the United States. This is no longer possible, as the contest is likely to be between, on the one hand, the developing countries, which have a preponderant majority in the United Nations, and, on the other hand, the United States and very few other states.

To enable the United States in this situation to bring a case before the International Court of Justice contesting the validity of a General Assembly action, it will be necessary for the United States to accept the jurisdiction of the Court for that purpose. Though the United States has accepted the jurisdiction of the Court in 1946 with respect to any legal dispute concerning the "interpretation of a treaty"—which term includes the Charter of the United Nations—the so-called "Connally amendment" to the U.S. declaration of acceptance nullifies the usefulness of that acceptance. Any state can contend that it has determined that its support or not of a particular decision of the United Nations is purely a matter of domestic discretion, not subject to the Court's jurisdiction.

The United States has also excepted from the jurisdiction of the Court "disputes arising under a multilateral treaty, unless (1) all parties to the treaty affected by the decision are also parties to the case before the Court, or (2) the United States of America specially agrees to jurisdiction." It is unlikely that the first condition could be complied with in any case which might arise under the Charter; but the United States could specially agree to the jurisdiction of the Court not only in a particular case but also, more generally, with respect to a particular multilateral treaty.

A new, specialized declaration is therefore needed. Such a declaration is permissible. For instance, the Iranian declaration of 1930 was limited to situations or facts relating directly or indirectly to the application of treaties accepted by Iran and subsequent to the ratification of the declaration. (In the Anglo-Iranian case the Court decided that the dispute did not relate to a treaty subsequent to the declaration and that the Court did not have jurisdiction.) In 1946 the United Kingdom accepted the jurisdiction of the Court with respect to "all legal disputes concerning the interpretation, application or validity of any treaty relating to the boundaries of British Honduras." This declaration was in addition to a more general declaration of 1929, which was revised from time to time.

Similarly, the United States may file an additional declaration limited to disputes relating to the interpretation of the United Nations Charter. Such a declaration will be in addition to, and not a substitute for, the declaration of 1946, and would be in a way equivalent to a special treaty provision conferring jurisdiction on the Court, as has been done in many treaties since 1946. Many such clauses have by now been accepted by the Senate as permissible exceptions to the Connally amendment. (A list prepared by the Office of the Assistant Legal Adviser for Treaty Affairs, Department of State, in 1975 lists 36 multilateral and 22 bilateral treaties containing such clauses.)

Such a declaration might, for instance, read as follows:

The United States of America recognizes as compulsory *ipso facto* and without special agreement, in relation to any other State accepting the same obligation, the jurisdiction of the International Court of Justice in all legal disputes hereafter arising concerning the interpretation or application of the Charter of the United Nations.

This declaration is made for a period of five years. Unless it is denounced six months before the expiration of that period, it shall be considered as renewed for a further period of five years and similarly thereafter.

Should the United States file such a declaration, it would be able to bring before the Court a dispute with any state about the consistency of any General Assembly resolution with the Charter of the United Nations, provided that the other state has accepted the jurisdiction of the Court with respect to disputes relating to treaty interpretation, without any reservation allowing that state to exclude in some manner a dispute relating to Charter interpretation.

Should, for instance, the United States and state Alpha disagree during the General Assembly meeting whether a particular resolution is valid under the Charter, and should the United States thereafter through an exchange of diplomatic notes ascertain that Alpha persists in its interpretation, after an appropriate warning about its intentions, the United States will be able to bring the dispute to the Court, if Alpha's declaration contains no blocking reservations. Similarly, cases could be brought against any other state which has accepted the jurisdiction of the Court without any relevant reservations and has taken a point of view different from the United States.

It would seem desirable to obtain the consent of the Senate to such a declaration as soon as possible, without waiting for a situation in which the United States may find it necessary to contest an important UN decision. It may not be too difficult to obtain such consent, in view of the fact that a large majority of the Senate is concerned about the possibility of serious violations of the Charter occurring at sessions of the General Assembly.

Of course, it needs to be considered that the United States may also be accused of having violated the Charter on some occasion, and by reciprocity such a case could be brought against the United States. This

problem has two aspects: allegations of past violations, and the possibility of future violations. The proposed declaration is limited to "disputes hereafter arising" and will not allow the dredging up of any past situations. As far as future disputes are concerned, if the United States makes such a declaration, it would have to consider carefully in each case that any U.S. action which may be considered by some other state a violation of the Charter could be brought before the Court. In some cases; this fact may have some restraining influence on U.S. decisionmakers, both the Administration and the Congress. For a country which claims to be dedicated to the rule of law in world affairs, such restraint may be salutary. But the main importance of the declaration will be in restraining the action of other states, as for the first time the United States would have a legal weapon to challenge those actions of the United Nations which it considers contrary to the Charter. This might be a more useful weapon than a threat to withdraw from the United Nations, an act which might have as disastrous consequences as U.S. refusal to join the League of Nations.

LOUIS B. SOHN

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STATEMENT OF OWNERSHIP, MANAGEMENT AND CIRCULATION  
(Act of August 12, 1970: Sec. 3685, Title 39, U.S. Code)

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## NOTES AND COMMENTS

### SUNKEN SOVIET SUBMARINES AND CENTRAL INTELLIGENCE; LAWS OF PROPERTY AND THE AGENCY

In a series of newspaper columns and stories beginning March 19, 1975<sup>1</sup> the American public was told apparently correctly about the partial success of the Central Intelligence Agency in raising a Soviet submarine, its equipment, and dead crew from the Pacific Ocean floor. The location of the pertinent activities was reported to be well beyond any state's claim to territorial waters, continental shelves, contiguous zones, or other asserted inhibiting zones. The CIA vessel, *The Glomar Explorer*, was disguised as a commercially operated oceanographic research vessel. No international legal implications seem to have been perceived by the newspapers in the American intelligence activities.<sup>2</sup>

In fact there are some implications for the international legal order that may be worth a little thought.

It has long been accepted, even without any noteworthy incident, that state property remains state property unless expressly relinquished<sup>3</sup> or captured by another state in the exercise of belligerent rights. Indeed, in the case of capture at sea even in the exercise of belligerent rights it has been assumed to be clear law for several centuries that transfers of rights to property require something like prize court proceedings to supersede the property rights fixed by the sovereign whose property or whose nationals' property has been taken.<sup>4</sup> Prize court proceedings may be dispensed with when the capturing sovereign retains all rights for itself. However, at classical international law there appears to have been no question that the assertion of any degree of direct control over the property of a foreign sovereign was a hostile act.<sup>5</sup>

Even if asserting dominion over a foreign state vessel were not a hostile act, maritime law, which the United States has always regarded as part of the law of nations,<sup>6</sup> does not follow the same rules regarding "abandoned" property as the usual American municipal law. Maritime law gives

<sup>1</sup> N. Y. Times, March 19, 1975, at 1, col. 8.

<sup>2</sup> Cf. Boston Globe, March 20, 1975, at 7, col. 1.

<sup>3</sup> The classical case coming nearest the point appears to be *The Constitution*, 4 P.D. 39 (1879). See also Lord Stowell's opinion in *The Prins Frederik*, 2 Dods. 482, 484-5, 165 E.R. 1543 at 1554 (1820). The U.S. position seems clear: "In the absence of transfer or abandonment of US interests . . . salvage of such cargoes or hulks requires US consent." 9 WHITEMAN, DIGEST OF INTERNATIONAL LAW 221 (1968).

<sup>4</sup> Cf. *Lindo v. Rodney* [1782] 2 Doug. K.B. 613 note. Lord Mansfield's erudite opinion is reprinted in SCOTT, CASES ON INTERNATIONAL LAW 1044 (1922).

<sup>5</sup> Cf. *The Parlement Belge* [1880] 5 P.D. 197.

<sup>6</sup> Cf. COLOMBOS, THE INTERNATIONAL LAW OF THE SEA (6th ed. 1967) 348, citing *The Belgenland*, 114 U.S. 355 (1885).

liens to salvors of abandoned property and includes within the definitions of property subject to salvage property actually jettisoned or lost at sea.<sup>7</sup> According to the more or less classical definition in Kent's *Commentaries*, salvage is the appropriate term for saving in whole or in part any ship or cargo "from impending danger, or . . . actual loss, in cases of shipwreck, derelict, or recapture."<sup>8</sup> It appears to be only after ownership of the property has ceased to be identifiable or, in the case of a privately owned vessel, the vessel itself has become a "wreck," that it becomes "marine property" and subject to full appropriation by the finder.<sup>9</sup> If the property is identifiable as foreign state property there hardly seems room for a question as to the responsibility of the salvor to return it to its owners.<sup>10</sup> There may be a claim for an amount not exceeding the value of the property saved, although there is some question whether a state agency is capable of making that sort of claim,<sup>11</sup> but there can be no lien on the vessel.<sup>12</sup>

One is moved to wonder whether those who see no legal question about the United States' appropriating the Soviet vessel would feel the same if the vessel lost had been an American vessel, say the nuclear submarine *U.S.S. Thresher*, and the salvor a French scientific research vessel.

The clandestine operation and its disguise are likely to lead to questions about the credibility of the negotiating position of the United States on the law of the sea. Is the international community likely to consider the U.S. activities mere clever espionage directed against the Soviet Union? Or will there not be some feeling that the United States has been using scientific research as a cover for activity that is somehow improper, if not actually illegal? It is commonplace for international lawyers that disguise is a form of confession to impropriety; the international community may see a crossing of the line between mere impropriety and illegality in international law after the full facts are known. The plea that deception in this case was required solely by apprehension of the Soviet political or

<sup>7</sup> COLOMBOS, *supra* note 6, at 346-47. See also *Gardner v. Ninety-Nine Gold Coins*, 111 F. 552 (1st Cir. 1889), in which \$1,050 found on the body of a dead passenger of a vessel derelict was decreed to be shared between the finders and the administrators of the decedent's estate.

<sup>8</sup> BLACK'S LAW DICTIONARY (rev'd 4th ed. 1968) 1506, citing 3 KENT COMM. 245. The quoted language is in the 1873 edition of KENT, COMMENTARIES ON AMERICAN LAW at the place cited. In the first edition (1828) "salvage" is defined at 196 simply as "the compensation allowed to persons by whose assistance a ship or its cargo has been saved in whole or in part from impending danger, or recovered from actual loss; . . ."

<sup>9</sup> COLOMBOS, *supra* note 6, at 310. Cf. *Hollingsworth v. Seventy Doubloons & Three Small Pieces of Gold*, F.Cas. No. 6,620 (D.C.E.D. Pa. 1820); *Fisher v. The Sybille*, F.Cas. No. 4,824 (C.C.D.S.C. 1816), *aff'd* 17 U.S. 98 (1819); *Cossman v. West* [1887] 13 A.C. 160, 181.

<sup>10</sup> Cf. WOOLSEY, AN INTRODUCTION TO THE STUDY OF INTERNATIONAL LAW 73 (5th ed. 1878).

<sup>11</sup> Certainly "ships of war" and "Government ships appropriated exclusively to a public service" are excluded from the terms of the United States Salvage Act (44 U.S.C. §§727-31). But U.S. Government vessels may perform salvage services under other provisions of law, and the relevancy of that Act to an international claim is only indirect. See 9 WHITEMAN, *supra* note 3, at 219-21.

<sup>12</sup> See cases cited note 3 *supra*.

military reaction rather than any apprehension of illegality is unconvincing in light of the probable results of the United States action in fora in which the Russians are not present. If this effect of the American activity was not considered by American planners, that seems more a reflection on their lack of perceptiveness than on the underlying nature of the international legal order. To assert that American disguise was directed solely at deceiving the Soviet Union also seems odd when it is remembered that the Russians were asserted not to know where their vessel had been lost and were likely, if really ignorant of what was going on, to have concluded that overt American activities related to a lost American vessel or some other American interest. Furthermore, since espionage as such is not a violation of international law,<sup>13</sup> the elaborate efforts to disguise the operation certainly seem to indicate some apprehension by the American planners that what they were doing violated some sensitivities and that something more than mere propriety was involved, even if they never focussed their attention squarely on the legal question.

In these circumstances, to call the American raising of part of the Soviet public vessel merely a kind of intelligence operation, analogous to the acquisition of state information which does not deprive any state of tangible property, is to depart from a long and deep legal tradition which does in fact distinguish between espionage and the exercise of property rights over identifiable tangible property lost at sea. The American sensitivity over their own activities and the probable international reaction to the misuse of "scientific research" in the *res communis* of the ocean are strong evidence that the law was violated. It is, of course, possible to argue that the international law relating to state-owned property in time of peace has changed in recent years. But in the circumstances that conclusion seems to be more than the evidence will support.

It is possible to argue that the impact of "legal realist" jurisprudence and the deplorable state of the scholarly tradition of the law in the United States and the Soviet Union have reduced international law to a minor part of political relationships, so that the rules of law may be violated with impunity (indeed, inadvertently) when it seems desirable to do so by any agency of government and that legal advice is either not sought or not heeded whenever it is apprehended that legal advice might inhibit what is seen (probably myopically) to be desirable action. There have been instances when that conclusion has seemed the most compelling.<sup>14</sup> But in this case, ignorance of the law and changed views as to the value of the legal tradition seem incomplete as an answer since, as noted above, to change hypothetically the identity of the parties seems overwhelmingly likely to change one's perception of the applicable rules. The law would

<sup>13</sup> Acts done by spies that violate the laws of the territory they are in may be criminally punishable, but the state sending them is not likely to suffer opprobrium. See Baxter, *So-Called 'Unprivileged Belligerency': Spies, Guerrillas and Saboteurs*, 28 B.Y.I.L. 1951 323 (1952) at 330-33.

<sup>14</sup> See Rubin, *Some Legal Implications of the Pueblo Incident*, 18 I.C.L.Q. 961 (1969) published simultaneously in 49 *Oregon L. Rev.* 1 (1969).

probably have been felt to forbid the transfer of title to state property lost at sea without the consent of the property-losing sovereign.

It may be thought that some cultural differences make it possible to communicate views of international propriety between the United States and its NATO allies but make equivalent communication between the United States and the Soviet Union impossible—that there are simply fundamental differences between the United States and the Soviet Union as to what is acceptable international behavior. That seems hardly likely in the circumstances, when no attempt at communication has been made and there is no evidence or likelihood that the Soviet Union would misunderstand the legal grounds of a return to it of the parts of its submarine that have been raised. As far as is known, there is no reason to suspect that Soviet views of law differ at all from American views in this regard and, by the usual application of Occam's razor, an explanation that involves unnecessary assumptions must be rejected when a simpler explanation is at hand. That the Soviet Union might refuse to accept a view of law as binding on itself that requires the return of appropriated foreign state property in these circumstances is hardly evidence of an inability to communicate that view.

Rather, the most compelling legal implication appears to involve the acceptance of relations between the United States and the Soviet Union in some matters as more nearly akin to the relations between belligerents than to relations in a state of peace. This possibility, that normal relations between states that do not choose to exercise the full range of belligerent rights against each other but which do not accept the full restraints of a state of peace, was proposed by Judge Jessup in 1954<sup>15</sup> and has behind it a long tradition which has never been carefully analyzed. The institution of so-called "pacific blockade"<sup>16</sup> is but one classical example of many. Judge Jessup cites several others. It would be interesting to consider whether a greater degree of stability than is usually perceived could not be found inherent in the modern international order if some effort were made to consider other evidences of the existence of coherent rules for a "state of unarmed conflict" within that order. To define the circumstances and rules appropriate for relations in a "state of unarmed conflict" might serve to minimize the damage done to general relations by U.S. activity in apparent disregard of the law and might help in other contexts, for example in negotiations with third states regarding scientific research at sea.

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<sup>15</sup> Jessup, *Should International Law Recognize an Intermediate Status between Peace and War?*, 48 AJIL 98 (1954).

<sup>16</sup> See 2 McNair, *INTERNATIONAL LAW OPINIONS* 403-15 (1956).



## CORRESPONDENCE

### TO-THE-EDITOR-IN-CHIEF

In her note on "The Neutrality Board and Armed Merchantmen, 1914-1917," in the *Journal* for April, 1975, Ms. A. M. McDiarmid mentions in passing the decision of the International Military Tribunal at Nuremberg finding Admiral Doenitz not guilty of war crimes on account of his direction of submarine attacks without warning on British armed merchant ships, by reason of the integration of these merchant ships into the "warning network of allied intelligence." Her comments on this circumstance, and her inclusion of it in her account of certain legal implications of arming merchant ships, seem to indicate that she sees some essential or significant connection between the decision of the Military Tribunal and the question of the legal status of armed merchant ships. In this I believe she is mistaken.

The Nuremberg decision had nothing to do with the status of armed merchant ships. The question of their being armed appears in the decision merely to distinguish it from the parallel case involving unarmed merchant ships, but the main legal issue in the judgment was quite distinct from the question of whether a ship was armed. The question revolved around the fact that all British (and Allied) merchant ships were required by the Admiralty without exception to report by radio all sightings of enemy submarines whether or not they were intercepted or attacked. The writer remembers vividly as a new radio officer in the Norwegian Merchant Marine in 1943 having impressed upon him the vital necessity of ensuring that a radio report was sent out. It was stressed that the radio officer was the most potent weapon the Allies had against submarines attacking ships sailing independently. While the writer also recalls the many jocular, not to say obscene, suggestions he received from his shipmates about how the radio officer might be most effectively used in the attack on the submarine menace, the point was that only by exposing itself and having its position reported to Allied naval patrols did the submarine become vulnerable and it had to weigh this cost against the value of sinking a single ship. These required reportings thus made the merchant vessel an indisputable and effective extension of the armed force of the state. It is well established that a civilian seeking and voluntarily giving information about an invading military force to the armed forces of his own country is liable to be treated as a spy or a *franc-tireur* and shot out of hand. In the same way, a civilian vessel passing current information about enemy ships to its own navy is subject to immediate attack; when it is notorious that in all cases civilian vessels will report the current activities of an enemy warship, then all such ships may be attacked without warning. This at least was the judgment at Nuremberg, and it is difficult to reject it.

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*Ms. McDiarmid replies:* Perhaps I should have begun my note on "The Neutrality Board and Armed Merchantmen, 1914-1917," with the words: "Time was when international lawyers were much concerned with the question of the merchant ship armed against the submarine." But then we

would have missed Professor Evans' reminiscences and his analysis of part of the Nuremberg judgment on Doenitz. It is quite true that if belligerent merchant vessels report activities of an enemy warship and thereby assist the intelligence system of their armed forces they may be attacked without warning.

It is possible that the armament of British merchant ships did not weigh heavily with the Tribunal. But, in assessing the charge that Doenitz waged unrestricted submarine warfare contrary to the Naval Protocol of 1936 and the rules laid down in the London Naval Agreement of 1930, the Tribunal stated:

In the actual circumstances of this case, the Tribunal is not prepared to hold Dönitz guilty for his conduct of submarine warfare against British armed merchant ships.

# CONTEMPORARY PRACTICE OF THE UNITED STATES RELATING TO INTERNATIONAL LAW

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The material in this section is arranged according to the system employed in the annual *Digest of United States Practice in International Law*, published by the United States Department of State.

## STATES—INTERNATIONAL STATUS, ATTRIBUTES, AND TYPES

### *Rights and Duties of States* (U.S. *Digest*, Ch. 2, §1)

Following the Cambodian seizure of the U.S. merchant ship SS *Mayaguez* on May 12, 1975, and the use by the United States of Utapao airbase in Thailand as a takeoff point for the rescue of the crew, the Government of Thailand charged publicly that the United States had not asked permission to use the base for an operation that the Thai Government regarded as embarrassing and violative of Thai sovereignty. Secretary of State Kissinger, when asked at a press conference in Washington on May 16, 1975, whether there had been a violation of Thai sovereignty, responded:

With respect to Thailand, we have, of course, a treaty relationship with Thailand in SEATO [Southeast Asia Treaty Organization]. And we have had a series of base arrangements with them which over the period of years has led to a degree of cooperation in events in Indochina which were in the mutual interest and in which we have greatly appreciated the assistance that Thailand has given us.

In the course of this decade, it may be that a pattern of action has developed that made us assume that our latitude in using these bases was greater than the current situation in Southeast Asia would permit to the Thai Government. And therefore, insofar as we have caused any embarrassment to the Thai Government, we regret those actions.

At the same time, it is clear that any relationship between us and another country must be based on mutual interest. And we, I believe, have a reason, or have a right, to expect that those countries that have an alliance relationship with us look with some sympathy at matters that concern the United States profoundly.<sup>1</sup>

On May 17, 1975, the Foreign Minister of Thailand, Chatchai Chunchawan, presented a formal note of protest to the American Embassy in Bangkok regarding the use of Thai territory. It stated, in part:

The Royal Thai Government is deeply concerned over the action taken by the United States in the recent *Mayaguez* affair which has seriously impinged upon the national sovereignty of Thailand.

... Despite the clearly established position of the Royal Thai Government as earlier conveyed to the United States Government, Thai

\* Office of the Legal Adviser, Department of State.

<sup>1</sup> 72 DEPT. STATE BULL. 753 (1975).



territory was used by the United States for its military action against Cambodia to recover the vessel *Mayaguez* on Thursday, May 15, 1975, and it was not until the military action had been completed to the satisfaction of the United States that the Marines were withdrawn from Thailand.

In the light of the gravity of the situation evolving from these regrettable developments in which the United States chose to disregard the will of the Thai Government and people, the Royal Thai Government considers that, in order to maintain the traditional ties of friendship between Thailand and the United States and to promote their future cooperation on the basis of equality and mutual interest, it is necessary to ensure that the sovereignty of Thailand be respected and that the goodwill and friendship of Thailand be not abused again.<sup>2</sup>

The Thai note also stated that a review of all aspects of cooperation and commitments between Thailand and the United States would be undertaken immediately.

On May 19, 1975, the United States Government responded in a note which was handed to the Thai Foreign Minister at Bangkok, reading, in part, as follows:

The United States regrets the misunderstandings that have arisen between Thailand and the United States in regard to the temporary placement of Marines at Utapao to assist in the recovery of the SS *Mayaguez*. . . .

. . . There is enclosed an account of the incident. . . . As this account demonstrates, speed of action was essential. The actions and public statements of the new Cambodian regime indicated to us that any delay in recovering the ship and rescuing the crew could have had the most serious consequences.

It is clear that by its action the United States was able to counter a common danger to all nations and to the world's ocean commerce presented by this illegal and unwarranted interference with international shipping routes in the Gulf of Thailand.

The United States Government wishes to express its understanding of the problem caused the Royal Thai Government by these procedures and wishes to repeat its regret. The policy of the United States continues to be one of respecting the sovereignty and independence of Thailand. The unique circumstances that have led to the recent turn of events do not alter this traditional relationship, and are not going to be repeated; the Government of the United States looks forward to working in harmony and friendship with the Royal Thai Government.<sup>3</sup>

Enclosed with the note was an account of the incident drawn substantially from the report President Ford had submitted to the United States Congress on May 15, 1975.<sup>4</sup>

The United States note was formally accepted, and at a news conference in Bangkok held shortly afterwards the Thai Foreign Minister said that the case was closed and that he believed "bygones should be bygones." He

<sup>2</sup> U.S. Embassy Bangkok's telegram No. 8995, May 17, 1975, to Dept. of State.

<sup>3</sup> 72 DEPT. STATE BULL. 827 (1975).

<sup>4</sup> *Id.* 721.

also stated that in view of the United States note, the Thai Ambassador in Washington would be called home for consultations, not formally recalled as had been previously indicated.<sup>6</sup>

#### INTERNATIONAL ORGANIZATIONS

##### *Legal Effects of Acts (U.S. Digest, Ch. 2, §4g)*

Stephen M. Schwebel, Deputy Legal Adviser of the Department of State, presented the United States position as to the legal effect of resolutions and declarations of the United Nations General Assembly in a letter dated April 25, 1975, to Marcus G. Raskin, Co-Director of the Institute for Policy Studies. Mr. Schwebel's letter reads in pertinent part:

There is no official paper which generally states a policy position by the United States as to the legal effect of United Nations General Assembly resolutions and declarations. As a broad statement of U.S. policy in this regard, I think it is fair to state that General Assembly resolutions are regarded as recommendations to Member States of the United Nations.

To the extent, which is exceptional, that such resolutions are meant to be declaratory of international law, are adopted with the support of all members, and are observed by the practice of states, such resolutions are evidence of customary international law on a particular subject matter. In addition, it should be noted that General Assembly resolutions passed pursuant to Article 17 of the Charter regarding assessed contributions to the United Nations budget, as well as certain resolutions governing the Organization's internal acts (e.g., election of members of the Security Council, directions to the Secretariat), are binding.<sup>1</sup>

#### OBSERVANCE, APPLICATION, AND INTERPRETATION OF TREATIES

##### *Application (U.S. Digest, Ch. 5, §2)*

Arthur W. Rovine, Assistant Legal Adviser for Treaty Affairs, in a letter dated April 23, 1975, responded to an inquiry from Christopher J. Makins, First Secretary of the British Embassy in Washington, concerning the general practice of the United States on the subject of succession to treaties by newly independent nations. Mr. Rovine's letter states in part:

While the Department of State strongly prefers to receive from a newly independent nation a statement of its intention to be bound by a particular multilateral treaty before we consider that nation a party to such treaty, we are generally prepared to accept as valid evidence of succession general declarations such as those frequently made to the United Nations Secretary-General. Thus we are prepared to list as parties to multilateral agreements states which have made such general declarations. This would not be applicable, of course, in cases necessitating the consent of all parties to the agreement, or cases in which such succession would be incompatible with the object and purpose of the agreement. In addition, we examine these declarations closely

<sup>6</sup> N.Y. Times, May 20, 1975, at 1.

<sup>1</sup> Dept. of State File No. P75 0075-445.

to determine whether they contain reservations or other statements, such as clauses permitting termination in a fashion not permitted by the agreement, that may themselves be incompatible with the object and purpose of the agreement.

As for bilateral treaties, the United States normally attempts to make detailed arrangements with newly independent states with respect to our treaty relationships. Pending the conclusion of such arrangements, we have accepted general declarations as sufficient for purposes of continuing a particular treaty relationship, but again provided that the declarations contain no reservations or conditions inconsistent with the object and purpose of the agreement in question.<sup>1</sup>

#### EXECUTIVE AGREEMENTS

##### *Proposed Legislation (U.S. Digest, Ch. 5, §5)*

On May 13, 1975, the Subcommittee on the Separation of Powers of the Senate Committee on the Judiciary began hearings on bills S. 632 and S. 1251, to require congressional approval of executive agreements.

S. 632, introduced on February 7, 1975, by Senator Lloyd M. Bentsen, Jr., would require that all executive agreements made on or after the date of the enactment of the bill be submitted for congressional review. Such agreements would enter into force only after a 60-day waiting period from the date of transmittal, unless within that period both Houses agreed to a concurrent resolution stating their disapproval. Section 5 of the bill provides that the above requirements "shall not apply to any executive agreements entered into by the President pursuant to a provision of the Constitution or prior authority given the President by treaty or law." The term "executive agreement" is defined to mean

any bilateral or multilateral international agreement or commitment, other than a treaty, which is binding upon the United States, and which is made by the President or any officer, employee, or representative of the executive branch of the United States Government.

S. 1251, introduced by Senator John Glenn on March 20, 1975, contains a similar 60-day waiting period, but it provides that executive agreements are subject to Senate disapproval only, rather than disapproval by concurrent resolution of both Houses. The Glenn bill defines an executive agreement as

any bilateral or multilateral international agreement or understanding, formal or informal, written or verbal, other than a treaty, which involves, or the intent is to leave the impression of, a commitment of manpower, funds, information, or other resources of the United States, and which is made by the President or any officer, employee, or representative of the executive branch of the United States Government.

The Glenn bill has no provision similar to section 5 of the Bentsen bill.

Monroe Leigh, Legal Adviser of the Department of State, testified before the Subcommittee in opposition to the bills, emphasizing their "constitu-

<sup>1</sup>Dept. of State File No. P75 0070-2294.

tional deficiencies" as well as practical problems, and offering some alternative possibilities in the way of increased flow of information to the Congress in the area of foreign policy.<sup>1</sup> Excerpts from Mr. Leigh's testimony follow:

As the subcommittee is aware, on August 22, 1972, the President signed into law P.L. 92-403, known as the Case Act, under which the Secretary of State is required to transmit to the Congress the text of any international agreement other than a treaty, to which the United States has become a party, no later than 60 days after its entry into force. Since the adoption of the Case Act, the Department of State has transmitted the texts of 657 executive agreements to the Congress. In addition, although not required by law to do so, the Department has also transmitted with each agreement a background statement setting forth in some detail the context of the agreement, its purpose, negotiating history, and effect.

The Case Act makes special provision for transmittal of agreements "the immediate public disclosure of which would, in the opinion of the President, be prejudicial to the national security of the United States . . ." These agreements are transmitted to the Senate Committee on Foreign Relations and the House Committee on International Relations under "an appropriate injunction of secrecy to be removed only upon due notice from the President." Since the adoption of the Case Act, the executive branch has entered into and the Department has transmitted to the Congress 29 agreements under this category.

A second development of major importance in the three years since hearings were held on this subject has been the revision of the Department's Circular 175 procedure. The revised procedure has two objectives: (1) to meet requests by members of the Senate Committee on Foreign Relations to clarify the guidelines to be considered in determining whether a particular international agreement should be concluded as a treaty or as another form of an international agreement; and (2) to strengthen provisions on consultation with the Congress.

With respect to the consultation provisions, Section 723.1(e) of the Circular 175 procedure now requires those responsible for negotiating significant new international agreements to advise appropriate congressional leaders and committees of the President's intention to negotiate such agreements, to consult during the course of any negotiations, and to keep Congress informed of developments affecting them, including especially whether any legislation is considered necessary or desirable for the implementation of the new treaty or agreement.

The procedure also requires consultation with the Congress when there is a question whether an agreement should be concluded as a treaty or in some other form.

. . . further development of our procedures for consultation with the Congress remains the most fruitful approach to an acceptable institutional framework for executive-legislative cooperation in the making of international agreements. Perhaps using the new Circular 175 procedure as a starting point, we might be able to develop better institutional methods for achieving the common goal of enhancing the role of Congress without unduly constraining the effective conduct of U.S. foreign policy. . . .

<sup>1</sup> 72 DEPT. STATE BULL. 829 (1975).

### *Constitutional Deficiencies of Proposed Bill*

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Section 5 of the Bentsen bill . . . as we read the bill, would limit the bill's application since all executive agreements are negotiated by the President under the authority of the Constitution and all are entered into pursuant to the Constitution or prior statute or treaty. My interpretation of section 5 is that it excludes from application all categories of executive agreements. Even if a different interpretation were placed on section 5, only a tiny fraction at most of such agreements would be covered by the bill.

\* \* \* \* \*

The Glenn bill and the Bentsen bill without section 5 would, in my view, be unconstitutional if enacted into law as presently written. They would appear to rest upon an assumption that there is no independent constitutional authority in the President to conclude executive agreements. It is true that the vast majority of executive agreements are made pursuant to statute or treaty, but some agreements are concluded under the authority of the President's independent constitutional power. With these Congress may not constitutionally interfere. This view is not peculiar to the Department of State or to the executive branch generally. Rather it has long been accepted by legal scholars and by the Supreme Court of the United States. I refer to *U.S. v. Belmont*, 301 U.S. 324 (1937), and *U.S. v. Pink*, 315 U.S. 203 (1942).

Several provisions of the Constitution have long been held to authorize the making of executive agreements. Most generally, article II, section 1, provides that "The executive Power shall be vested in a President of the United States of America." In the case of *U.S. v. Curtiss Wright Export Corp.*, 299 U.S. 304 (1936), the Supreme Court indicated that inherent in this executive power is the power to conduct foreign relations. Quoting John Marshall, the Court said that "The President is the sole organ of the nation in its external relations. . . ." The Court also noted that the "powers of external sovereignty" of the nation included "the power to make such international agreements as do not constitute treaties in the constitutional sense. . . ." The executive power clause enables the President to conclude agreements for the purpose of settling differences with other governments in order to ensure the satisfactory continuation of diplomatic relations.

Article II, section 2, of the Constitution provides that "The President shall be Commander in Chief of the Army and Navy. . . ." Many wartime agreements concerning military matters, such as armistices, force deployments, and control of occupied areas, have been concluded under this authority.

The power to appoint and receive ambassadors and other public ministers, found in article II, sections 2 and 3, has been recognized by the Supreme Court, in the *Belmont* and *Pink* cases, as a basis for executive agreements incident to the recognition of foreign governments, such as the settlement of claims against foreign governments.

. . . if there is one issue upon which all observers agree, it would be recognition of the President's authority to conclude certain executive agreements, even if within a narrow category, under the powers



granted him by the Constitution and without congressional interference or limitation. While the range of such agreements is narrow, and the total number thereof is no more than 2-3 percent of all U.S. executive agreements, it is nevertheless an important aspect of Presidential powers. There is no method short of constitutional amendment whereby the President's independent constitutional authority to conclude executive agreements may be limited. For this reason alone, the Glenn bill as it now reads, and the Bentsen bill without section 5, would be unconstitutional if enacted.

#### *Legislative Veto Provisions*

There is another feature of these bills which renders them defective on constitutional grounds. In those areas of foreign policy in which both the President and the Congress share responsibility, the President is frequently authorized by treaty or statute to conclude executive agreements. In my opinion such treaty or statutory authority to enter into executive agreements may not constitutionally be overridden or amended either by means of a concurrent resolution as provided in the Bentsen bill, or by the Senate acting alone, as envisaged by the Glenn bill. Such procedure would be contrary to article I, section 7, of the Constitution, which requires that:

Every Order, Resolution or Vote to which the Concurrence of the Senate and House of Representatives may be necessary (except on a question of Adjournment) shall be presented to the President of the United States; and before the Same shall take Effect, shall be approved by him or being disapproved by him, shall be repassed by two thirds of the Senate and House of Representatives, according to the Rules and Limitations prescribed in the Case of a Bill.

In my view, this mandatory language of the Constitution was intended to apply to any congressional action having legislative effect, or having the force of law. . . . one of the primary purposes of the provision was to ensure that Congress could not, through the technique of characterizing particular enactments having legal force as "orders" or "resolutions," evade the necessity of Presidential participation in the legislative process.

It is true that legislative veto provisions have been enacted into law on many occasions since the early 1930's. But there are several factors that render these enactments of little value as legal precedent to support the Bentsen and Glenn bills.

First, such laws as do exist providing for a legislative veto have been attacked on constitutional grounds by many authorities on constitutional law. There have been no court tests of the validity of any of these acts, and the constitutional law questions they raise are not settled. The Bentsen and Glenn bills would raise these questions in a very new and disturbing way. Let us take one example.

Congress has granted the President specific authority to enter into P.L. 480 executive agreements:

. . . the President is authorized to negotiate and carry out agreements with friendly countries to provide for the sale of agricultural commodities for dollars on credit terms or for foreign currencies. (7 U.S.C. 1701.)

Now suppose that Congress, in a shift of policy having nothing to do with the merits of any particular executive agreement, decides it no longer approves of this P.L. 480 policy, but does not wish to repeal

the statute directly. It would have the option, if the Bentsen or Glenn bills were constitutionally valid, of automatically passing resolutions of disapproval of each and every P.L. 480 executive agreement thereafter entered into by the President. If the option is exercised, is there any doubt that the original statutory authority has been effectively repealed without the Presidential participation required by article I, section 7?

Or suppose that the Congress decides that it no longer approves of the phrase "or for foreign currencies" in Public Law 480. The Bentsen and Glenn bills would give the Congress the option of disapproving by concurrent resolution all P.L. 480 agreements in which agricultural commodities are agreed to be sold for foreign currencies. If Congress has power to exercise such an option, the clear effect is to amend the original statutory authority without Presidential participation.

In the most formalistic sense, the original statute still stands. But in substantive effect, the original legislative authority has been rendered unusable.

Second, the legislative precedents that do exist date only from the 1930's, and are inconsistent with the practice in force from the beginning of the Republic until the 1930's. Given the specificity of the constitutional provision and the long years of practice in accordance therewith, the recent and legally controversial examples of congressional lawmaking by concurrent resolution are hardly persuasive to support an even more questionable example as set forth in the Bentsen and Glenn proposals.

Third, the Bentsen and Glenn bills would carry the legislative veto far beyond those areas for which any constitutional justification has ever been advanced to date.

For example, among the first legislative vetoes by congressional resolution were those of the Reorganization Acts of the 1930's and 1940's. In justifying the constitutionality of the 1939 Act, the House committee which reported the bill proceeded on the constitutional theory that the power conferred upon the President by the Act was "legislative in character." (H. Rept 120, 76th Cong., 1st sess., at 4-6 (1939).) In delegating the legislative power of reorganization to the President, Congress retained a veto to make certain that the President's ultimate reorganization plan conformed with both the letter and intent of the delegated authority.

In subsequent reorganization acts, the inclusion of a legislative veto procedure was similarly justified under this "delegation" theory. (See *e.g.*, S. Rept 638, 79th Cong., 1st sess., at 3 (1945).) The same has also been the case in other types of legislation. In trade acts, for example, Congress has delegated to the President the power to determine tariffs, duties, and import quotas—a power initially vested in the legislative branch—but Congress at the same time has retained supervision over this delegated authority through the legislative-veto procedure.

With the Bentsen and Glenn bills, however, this constitutional argument vanishes. The conduct of foreign relations is not a legislative power. While Congress may, as a practical matter in some cases, restrict by statute the substantive concessions that the President can make to a foreign power, nonetheless the actual drafting, initiation,

and negotiation of the terms of an executive agreement belong entirely to the President. As the Supreme Court stated in the *Curtiss-Wright* case:

(The President) alone negotiates. Into the field of negotiation the Senate cannot intrude; and Congress itself is powerless to invade it.

Moreover, unlike prior vehicles for legislative vetoes, the bills by Senators Bentsen and Glenn do not involve the delegation by Congress of any powers. The substantive concessions which the President could make in negotiating an agreement would not be at all expanded by these two bills. Thus, the constitutional theory which has been raised in support of other legislative vetoes is inapplicable here. This means that if Congress wishes to disapprove an executive agreement, Congress' only constitutional recourse is to enact an appropriate statute under article I, section 7. Even then, such a statute would apply only to an executive agreement *not* concluded and implemented under the exclusive powers of the President.

*Practical Problems Created by the Bills*

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The bills present a serious national security problem in that they appear to be applicable in periods of declared war as well as in time of peace. Yet in World War II, for example, the President, under his powers as Commander in Chief, made hundreds of agreements necessary to the actual conduct of the war. Among these were agreements on deployment of forces as well as armistice and cease-fire agreements whose delicate timing could not await a 60-day review period. Interference with the President's power to make such agreements as Commander in Chief would frequently be unacceptable from the standpoint of national security, and it naturally raises the most serious questions with respect to constitutional validity. This is a core area of the President's ability to make agreements solely on the basis of his authority as Commander in Chief under the Constitution.

Even in time of peace, the 60-day waiting period would make a rapid resolution of everyday practical problems impossible. Some of these are of a routine nature that require only a simple exchange of notes, perhaps to compose a small difference by adopting a minor amendment to a previously concluded executive agreement itself of a routine nature. On occasion a disaster or other emergency requires extremely rapid action. Surely an emergency agreement providing for assistance to earthquake victims, to take but one example, cannot be subjected to a 60-day delay. These bills, if valid, would substantially undermine the utility of the United Nations Participation Act, to take one specific example.

In addition, neither bill, but particularly the Glenn draft with its extraordinarily broad definition of executive agreements, distinguishes between important agreements of interest to the Congress and minor or routine items such as postal contracts, standing orders with the Government Printing Office, and educational exchanges. The efficiency of the executive, and its ability to conduct the multiple aspects of relations in a complicated world, would be significantly diminished, while the large majority of agreements transmitted would be of little or no interest whatever to the Congress. There is no benefit in this either to the executive or legislative branch.

Notwithstanding that Congress is interested in only a small number of such agreements, the Bentsen and Glenn bills would, if enacted, result in a substantial interference with the President's authority as negotiator of almost all executive agreements. Because of the 60-day waiting period and the possibility of congressional disapproval, the United States would frequently be unable to obtain definite concessions from other governments because the President would be unable to give firm commitments on short notice, even on minor matters. And there would be a far greater risk of delicate compromises coming unravelled during the 60 days before the agreement could enter into force.

At the present time, the great majority of our executive agreements enter into force upon signature. Every foreign country enters into most of their agreements with us upon signature. Were either the Bentsen or Glenn bill to become law, the United States would be the only nation in the world unable to enter into any international agreement whatsoever either on signature or on short notice.

At best, the procedure would result in a great degree of uncertainty. In view of the congressional option procedure, the President would never be quite certain, even assuming prior consultation with Congress or prior statutory authorization, just what authority he possessed to negotiate and conclude agreements in a particular area. The uncertainty introduced into the negotiating process would clearly not be conducive to the effective conduct of U.S. foreign policy.

The Bentsen and Glenn approaches are also unnecessary and wasteful even from a congressional point of view. Any agreements involving an expenditure of funds (and most of those agreements of interest to the Congress involve such expenditures) are already subject to congressional review because Congress must authorize and appropriate the funds. This is important, for example, in the area of military base agreements. No military base can be constructed without congressional approval. Congress is intimately involved in the overwhelming majority of executive agreements on defense matters, either through authorizing legislation, such as the foreign aid legislation, or through review of programs by authorizing and appropriating committees. Status-of-forces agreements are closely monitored by a subcommittee of the Senate Committee on Armed Services. Atomic energy agreements are reviewed by the Joint Congressional Committee on Atomic Energy.

Finally, . . . there are a number of important areas in which these bills, if enacted, would have a serious adverse impact. The bills would create confusion in the administration of existing legislative authorizations under which the President has administered programs of national importance. For example, the military assistance programs are implemented country by country under the terms of bilateral military assistance agreements entered into pursuant to prior statute. The present bills would substitute a new procedure for formalizing the international agreements between the United States and other countries with respect to these programs.

. . . if further legislative regulation of executive agreements is needed, which is a question requiring further study, it is our view that it would be wiser to treat directly, through legislation, particular substantive areas of agreement making, rather than attempting to control the entire range of executive agreements through a pro-

cedural device that fails in large measure because it both attempts to do too much and is constitutionally defective.

#### *Alternative Possibilities*

I think it is clear that great improvements have been made in increasing the flow of information to the Congress for purposes of enhancing its capacity to perform its functions in foreign policy. There are further ways of developing executive-legislative cooperation, and some ideas in this area have already been suggested to the subcommittee.

Perhaps building on the Circular 175 procedure, we might explore the possibility of having the several Assistant Secretaries of State provide the relevant committees of Congress with regular and detailed briefings on developments in their areas of responsibility. This idea was put forward by Secretary of State Rogers in 1971 and repeated to this subcommittee by the then Legal Adviser, John Stevenson, in 1972.

Perhaps most important . . . is the necessity to recognize that our constitutional framework concerning foreign affairs establishes, as one scholar put it, "a government of interdependent as well as separate powers." The basic meaning of this structure should be cooperation rather than conflict, and a full flow of information permitting each branch effectively to carry out its functions in its areas of competence and interest.

Rigid controls of doubtful legality over a mass of agreements, most of which are minimal or no interest to Congress—that is simply not the best answer. Cooperation, consultation, full information, and recognition that both branches seek a healthy process of interaction in the making of foreign policy—that is the surest path toward a meaningful system of decisionmaking on behalf of the United States.

On May 15, 1975, Antonin Scalia, Assistant Attorney General, Office of Legal Counsel of the Department of Justice, testified before the Subcommittee. He stated that Department's opposition to the bills and, in particular, challenged the constitutionality of the proposed procedure for use of the concurrent resolution to override existing statutory or treaty authority to conclude executive agreements.<sup>2</sup>

#### INTERNATIONAL TRADE

##### *Export Control (U.S. Digest, Ch. 10, §2)*

On May 16, 1975, the Department of Commerce announced that effective at 12:01 a.m. that day shipments of virtually all U.S. products to Cambodia and South Vietnam would require validated export licenses.<sup>1</sup> The announcement stated that since the fall of those two countries into Communist hands, no validated licenses had been issued and all outstanding licenses had been suspended.

<sup>2</sup> Transcript of Hearings Before the Subcomm. on the Separation of Powers of the Senate Comm. on the Judiciary, May 15, 1975, at 314.

<sup>1</sup> Dept. of Commerce News, No. G 75-71, May 16, 1975. For the new regulations, see 40 Fed. Reg. 98 (1975), revising the Export Administration Regulations, 15 CFR Parts 370, 371, 374, 376, 385, and 390.

The embargo of U.S. exports to Cambodia and South Vietnam was taken after consultations with the Department of State and was authorized under the national security and foreign policy provisions of the Export Administration Act of 1969.<sup>2</sup> The action expanded validated licensing requirements to virtually all shipments to the two destinations.

Under the new classification, Cambodia and South Vietnam were listed as Group Z countries along with North Vietnam, North Korea, and Cuba. The general embargo policy then in effect for those countries was to deny licenses for any exports except where special humanitarian considerations were involved.

In testimony before the International Trade and Commerce Subcommittee of the International Relations Committee of the House of Representatives on June 4, 1975, Robert H. Miller, Deputy Assistant Secretary of State for East Asian and Pacific Affairs, after referring to the placement of Cambodia and South Vietnam in the Group Z category, stated:

This type of export controls was imposed on "the Communist controlled area" of Viet-Nam in 1958. Thus, when the Government of South Viet-Nam collapsed, it was a reasonable interpretation of the regulations that the Z category export controls were applicable to all parts of Viet-Nam. As far as Viet-Nam is concerned, the regulations announced on May 16 thus made no changes in the existing situation but only clarified them as they related to South Viet-Nam. The May 16 decision did extend these controls to Cambodia in order to make coverage of Cambodia consistent with that of Viet-Nam.

When the friendly Governments of Cambodia and South Viet-Nam capitulated to the force of arms of their opponents, we had the option of doing nothing or classifying these countries under one or the other categories of our export control regulations. There was the obvious need to deny strategically important goods to the new governments in South Viet-Nam and Cambodia. This could have been accomplished by establishing Y category controls which are now applicable to the U.S.S.R., to the People's Republic of China and most of the Eastern European countries. The trade effect of the export controls was not a major consideration. In the past five years we had no commercial, non-AID financed exports to Cambodia; during these years the same type of exports to South Viet-Nam ranged between \$30-50 million and it is reasonable to assume that even without controls U.S. trade with South Viet-Nam would be practically nil for the foreseeable future. . . . the decision to apply Z category controls was based primarily on the consideration that the Z category controls were already applicable to all of Viet-Nam once the Communist authorities took control. Because of North Viet-Nam's dominance over the areas, it was determined desirable to apply the same controls to Cambodia and South Viet-Nam that have long applied to North Viet-Nam.

. . . imposition of export and assets controls allowed us to stabilize these economic and commercial matters in a new situation unfavorable to our policies. With these controls in force we are now in a position to assess the two regimes as they emerge and in light of their actions.<sup>3</sup>

<sup>2</sup> P.L. 91-184; 83 Stat. 841; 50 U.S.C. App. §§2401-13; 9 ILM 192 (1970).

<sup>3</sup> Statement released at Dept. of State news briefing, June 4, 1975.

## TRANSNATIONAL CORPORATIONS, FOREIGN INVESTMENT, AND TAX LAW

*Transnational Corporations* (U.S. Digest, Ch. 10, §4)

The Department of State, on May 15, 1975, released at its noon press briefing a policy statement regarding reports of illegal activities by U.S. enterprises abroad. The statement was issued following press reports of investigations by the Securities and Exchange Commission concerning contributions by U.S. companies to officials of foreign governments, foreign political parties, and other agents in foreign countries. The following is an excerpt from the Department's statement:

\* \* \* \* \*

... the United States Government does not condone illegal activities by American business and industrial firms abroad. The United States condemns such actions by U.S. corporations in the strongest terms. Moreover, any American firm or individual making unlawful payments to officials of foreign governments cannot look to the Department of State for protection from legitimate law enforcement actions by the responsible authorities of either the foreign country in question or the United States.

At the same time, the U.S. Government believes it would be helpful if host governments would clarify the rules for foreign firms in their countries regarding political contributions and other payments. We assume that the investigation and prosecution of offenses by foreign authorities will be nondiscriminatory; that the penalties will be proportionate to the offense; and that persons or firms found guilty of improper conduct will be treated fairly and in accordance with international law.

On June 12, 1975, Phillip R. Trimble, Assistant Legal Adviser for Economic and Business Affairs, announced that the Department of State had established an Advisory Committee on Transnational Enterprises, to be comprised of approximately 30 public members drawn from private industry, the academic community, labor, the private bar, and other areas. The announcement stated that it had been determined, with the approval of the Director, Office of Management and Budget, to be in the public interest to have such a committee to advise on major issues and problems relating to transnational enterprises.<sup>1</sup>

## ECONOMIC SANCTIONS

*Arab Boycott* (U.S. Digest, Ch. 10, §12)

In a letter to Senator J. Glenn Beall, Jr., dated April 16, 1975, Ambassador Robert J. McCloskey, Assistant Secretary of State for Congressional Rela-

<sup>1</sup> 40 Fed. Reg. 115 (1975). See also Dept. of State *Press Release* No. 329, June 12, 1975. The Advisory Committee was established pursuant to §9(a)(2) of the Federal Advisory Committee Act (P.L. 92-463; 5 U.S.C. app. I, §9(a)(2), approved Oct. 6, 1972.

tions, explained the legal basis for United States application of most-favored-nation treatment to countries which enforce the Arab boycott against American firms. He pointed out that the United States grants most-favored-nation status by a blanket provision in U.S. law, by bilateral international agreements, and by multilateral agreements, particularly the General Agreement on Tariffs and Trade. The following is an excerpt from his letter:

Section 251 of the Trade Expansion Act of 1962 [19 U.S.C. 1881] provides that any duty or other import restriction or duty-free treatment proclaimed in carrying out any trade agreement negotiated pursuant to U.S. law shall apply to products of all foreign countries. Exceptions to this statutory extension of the most-favored-nation principle include, among others, most Communist countries and countries found to be discriminating against American goods. As long as an Arab country enforces the boycott equally against all countries, it will not have engaged in the sort of discrimination against U.S. firms which would preclude its eligibility for Section 251 treatment.

The typical bilateral agreement provides that each party will automatically grant the other party any trade concession which the former gives to any third country. In other words, the agreement does not provide for the harmonization of the two parties' trade restrictions, but rather that each party will enjoy whatever trade advantages the other chooses to grant to any of its trading partners. Thus an Arab country enforcing the boycott against firms of all countries would not be in violation of its MFN obligations to the U.S. for that reason alone.

Finally, the General Agreement on Tariffs and Trade (GATT) provides that each party will grant MFN privileges to all other parties. Israel and some Arab States that adhere to the boycott are parties. However, GATT contains a clause that exempts from the treaty's requirements any action taken by a party "which it considers necessary for the protection of its essential security interests . . . (iii) taken in time of war or other emergency in international relations" (Art. XXI(b)). The Arab States take the position that the boycott is within this exception, and maintain that application of the boycott equally against all countries does not conflict with their obligations under GATT.

The following Arab States that enforce the boycott have bilateral MFN agreements with the United States: Egypt; Iraq; Lebanon; Oman; Saudi Arabia; Syria; and Yemen Arab Republic. In addition, Egypt and Kuwait are parties to GATT; and as to Algeria, Bahrain, Qatar, United Arab Emirates and People's Democratic Republic of Yemen, GATT is being applied *de facto*.<sup>1</sup>

#### JUDICIAL SETTLEMENT: THE INTERNATIONAL COURT OF JUSTICE

##### *The International Court of Justice* (U.S. Digest, Ch. 13, §3)

Monroe Leigh, Legal Adviser of the Department of State, wrote a letter to Congressman Paul Findley on June 2, 1975, replying to a suggestion from Congressman Findley that the United States offer to join Cambodia in

<sup>1</sup> Dept. of State File No. P75 0065-2378.



submitting to the International Court of Justice the legal issues involved in the seizure of the SS *Mayaguez*. The *Mayaguez*, a U.S. merchant ship, had been seized by Cambodian forces on May 12, 1975, on a regular shipping route between Hong Kong and Sattahip, Thailand, and the United States had responded militarily to obtain its release. Mr. Leigh's letter reads, in principal part, as follows:

Your suggestion is a thoughtful one, which has substantial attractions, as the text of your statement to the House of Representatives shows. However, we are, on balance, disinclined to invite Cambodia to join in placing the *Mayaguez* issues before the Court for two reasons.

First, we believe that we have vindicated U.S. rights under international law by the action taken; with the release of the ship and crew, there is no continuing dispute which, from our viewpoint, the Court could usefully resolve. It should be noted in this regard that, to our knowledge, Cambodia has advanced no legal claims against the United States in respect of the *Mayaguez* incident.

Second, in view of the profoundly negative attitude of Communist states to the Court, we see little possibility that Cambodia would agree to submit the case to the Court. This attitude of Communist states is so well known that, if we made the offer, informed observers might tend to dismiss it as one we made confident that it would not be accepted. We are reinforced in this view by the fact that Cambodia has so far manifested no disposition to engage even in diplomatic communication, still less international adjudication.<sup>1</sup>

#### RESORT TO WAR AND ARMED FORCE

##### *SS Mayaguez Incident (U.S. Digest, Ch. 14, §1)*

Following the seizure on May 12, 1975, by Cambodian forces of the American merchant ship SS *Mayaguez* with a crew of 40 aboard and the failure of diplomatic efforts to obtain the release of the ship and crew, President Ford ordered U.S. military forces to board the illegally seized ship for the purpose of rescuing the crew and the ship, and to conduct supporting strikes against nearby Cambodian military installations. The following is the series of events leading to the resort by the United States to military force and the accomplishment of the U.S. mission, as reported in various official announcements and press reports.

On May 12, 1975, White House Press Secretary Ron Nessen announced that a Cambodian naval vessel had fired on a U.S. merchant ship in international waters in the Gulf of Thailand early that morning and forced it into the Cambodian port of Kompong Som, renamed Sihanoukville. The statement issued by the Press Secretary read as follows:

We have been informed that a Cambodian navel vessel has seized an American merchant ship on the high seas and forced it to the port of Kompong Som. The President has met with the NSC. He considers this seizure an act of piracy. He has instructed the State Department

<sup>1</sup> Dept. of State File No. P75 0092-2085.

to demand the immediate release of the ship. Failure to do so would have the most serious consequences.<sup>1</sup>

Mr. Nessen identified the seized vessel as the SS *Mayaguez*, an unarmed container ship, sailing under American registry on a voyage from Hong Kong to Sattahip, Thailand, which, when fired on, was about 60 miles off the coast of Cambodia and about eight miles from a rocky island claimed by both Cambodia and South Vietnam.

A statement issued by the Department of State shortly after the White House announcement on May 12 reported that immediate steps were being taken to obtain prompt release of the ship but that it would not be helpful to discuss publicly the details at that time. However, press reports based on "informed sources" indicated that contacts were made directly with the Chinese liaison office in Washington as well as with Chinese officials in Peking.

At a news briefing at the White House at 6:54 a.m. on May 13, 1975, Press Secretary Ron Nessen gave the following additional information on the seizure:

The merchant ship *Mayaguez* at last report was anchored close to the island of Koh Tang, 30 miles off the coast of Cambodia. During the night, Washington time, it was escorted by two Cambodian naval vessels from the point where it was originally boarded (that point was eight miles from the rock island of Poulo Wai) toward its present location. The ship is being kept under observation by U.S. military aircraft. The President was kept informed of developments during the night.<sup>2</sup>

On May 14, 1975, the Department of Defense issued an announcement that U.S. aircraft were being used in action to protect the captive crew. The announcement, read at a news briefing in the White House at 11:50 a.m., stated:

Beginning at 8:30 p.m. e.d.t. yesterday, there were indications that the Cambodians appeared to be attempting to move U.S. captive crewmen from the ship to the mainland. After giving warning, U.S. aircraft began efforts to block this movement.

Three Cambodian patrol craft were destroyed and about four others were damaged and immobilized. One boat succeeded in reaching Kompong Som.

U.S. aircraft had been receiving small arms fire from such boats for several hours prior to this action.

The *Mayaguez* is still anchored off Koh Tang Island. The first U.S. Navy vessel, the destroyer U.S.S. *Holt*, is now in the area.<sup>3</sup>

On May 14, 1975, the U.S. Government also appealed to the Secretary-General of the United Nations for assistance in obtaining release of the ship and crew, and reserved the right to take appropriate measures of self-defense under Article 51 of the United Nations Charter. Ambassador John

<sup>1</sup> 72 DEPT. STATE BULL. 719 (1975).

<sup>2</sup> *Ibid.*

<sup>3</sup> 11 *Weekly Compilation of Presidential Documents*, N. 20, May 19, 1975, at 511.

Scali, U.S. Representative to the United Nations, sent the following note, dated May 14, 1975, to the Secretary-General:

The United States Government wishes to draw urgently to your attention the threat to international peace which has been posed by the illegal and unprovoked seizure by Cambodian authorities of the U.S. merchant vessel, *Mayaguez*, in international waters.

This unarmed merchant ship has a crew of about forty American citizens.

As you are no doubt aware, my Government has already initiated certain steps through diplomatic channels, insisting on immediate release of the vessel and crew. We also request you to take any steps within your ability to contribute to this objective.

In the absence of a positive response to our appeals through diplomatic channels for early action by the Cambodian authorities, my Government reserves the right to take such measures as may be necessary to protect the lives of American citizens and property, including appropriate measures of self-defense under Article 51 of the United Nations Charter.\*

Later the same day Ambassador Scali sent a letter addressed to the President of the Security Council of the United Nations, stating that the U.S. Government had taken appropriate measures under Article 51 of the United Nations Charter to achieve the release of the vessel and its crew. The letter stated the following:

My Government has instructed me to inform you and the members of the Security Council of the grave and dangerous situation brought about by the illegal and unprovoked seizure by Cambodian authorities of a United States merchant vessel, the SS *Mayaguez*, in international waters in the Gulf of Siam.

The SS *Mayaguez*, an unarmed commercial vessel owned by the Sea-Land Corporation of Menlo Park, New Jersey, was fired upon and halted by Cambodian gunboats and forcibly boarded at 9:16 p.m. (Eastern Daylight Time) on May 12. The boarding took place at 09 degrees, 48 minutes north latitude, 102 degrees, 53 minutes east longitude. The vessel has a crew of about 40, all of whom are United States citizens. At the time of seizure, the SS *Mayaguez* was en route from Hong Kong to Thailand and was some 52 nautical miles from the Cambodian coast. It was some 7 nautical miles from the islands of Poulo Wai which, my Government understands, are claimed by both Cambodia and South Viet-Nam.

The vessel was on the high seas, in international shipping lanes commonly used by ships calling at the various ports of Southeast Asia. Even if, in the view of others, the ship were considered to be within Cambodian territorial waters, it would clearly have been engaged in innocent passage to the port of another country. Hence, its seizure was unlawful and involved a clear-cut illegal use of force.

The United States Government understands that at present the SS *Mayaguez* is being held by Cambodian naval forces at Koh Tang Island approximately 15 nautical miles off the Cambodian coast.

\* 72 DEPT. STATE BULL. 720 (1975); Press Release USUN-40(75), May 14, 1975.

The United States Government immediately took steps through diplomatic channels to recover the vessel and arrange the return of the crew. It earnestly sought the urgent cooperation of all concerned to this end, but no response has been forthcoming. In the circumstances the United States Government has taken certain appropriate measures under Article 51 of the United Nations Charter whose purpose it is to achieve the release of the vessel and its crew. . . .<sup>5</sup>

At 9:15 p.m. on May 14, two additional statements were released at the White House. The first announced the military measures taken by the United States and read as follows:

In further pursuit of our efforts to obtain the release of the SS *Mayaguez* and its crew, the President has directed the following military measures, starting this evening Washington time:

—U.S. Marines to board the SS *Mayaguez*;

—U.S. Marines to land on Koh Tang Island, in order to rescue any crew members as may be on the island;

—Aircraft from the carrier *Coral Sea* to undertake associated military operations in the area in order to protect and support the operations to regain the vessel and members of the crew.<sup>6</sup>

The second announcement was addressed to the Cambodian authorities. It stated:

We have heard radio broadcast that you are prepared to release the SS *Mayaguez*. We welcome this development, if true.

As you know, we have seized the ship. As soon as you issue a statement that you are prepared to release the crew members you hold unconditionally and immediately, we will promptly cease military operations.<sup>7</sup>

At 12:27 a.m. on May 15, 1975, the President announced the successful accomplishment of the U.S. mission to rescue the ship and its crew. He said:

At my direction, United States forces tonight boarded the American merchant ship SS *Mayaguez* and landed at the Island of Koh Tang for the purpose of rescuing the crew and the ship, which had been illegally seized by Cambodian forces. They also conducted supporting strikes against nearby military installations.

I have now received information that the vessel has been recovered intact and the entire crew has been rescued. The forces that have successfully accomplished this mission are still under hostile fire, but are preparing to disengage.

I wish to express my deep appreciation and that of the entire Nation to the units and the men who participated in these operations for their valor and for their sacrifice.<sup>8</sup>

<sup>5</sup> UN Doc. S/11689, May 15, 1975; 72 DEPT. STATE BULL. 720 (1975).

<sup>6</sup> *Id.* 721.

<sup>7</sup> *Ibid.* The communique broadcast by Cambodian radio charged that the SS *Mayaguez* had been in Cambodian territorial waters with the purpose of conducting espionage and provoking incidents. It stated that there was no intention of detaining the ship permanently and that it would be released. For the text as translated by the Foreign Broadcast Information Service, see N.Y. Times, May 16, 1975, at 15.

<sup>8</sup> 72 DEPT. STATE BULL. 721 (1975).

On that same day, May 15, 1975, the President reported the military action to the Congress in accordance with Section 4(a)(1) of the War Powers Resolution.<sup>9</sup> He stated that the operation had been ordered and conducted pursuant to the President's constitutional executive power and his authority as Commander in Chief of the United States Armed Forces.<sup>10</sup>

#### RESORT TO WAR AND ARMED FORCE

##### *Bilateral Commitments (U.S. Digest, Ch. 14, §1)*

Secretary of State Henry A. Kissinger, in a television interview at the Department of State, broadcast on May 5, 1975, was asked by Barbara Walters why he had not revealed to Congress the content of a letter written by President Nixon to President Nguyen Van Thieu of South Vietnam in January 1973,<sup>1</sup> promising that the United States would respond with full force to any violations of the Paris peace agreement, especially after Senator Henry M. Jackson had raised the question. The Secretary replied:

It is a very important question of the conduct of foreign policy. Presidents have been writing letters to foreign heads of state since the founding of the Republic. During the difficult months when we were trying to convince President Thieu to accept the Paris accords, many letters were written—just as every President, including President Ford . . . , has been writing letters to foreign heads of government.

If we begin revealing the content of letters simply because a Senator—on top of it a Presidential candidate, but quite apart from this—a Senator alleges that there is something in these letters, then Presidential correspondence will lose its private character.

Moreover in this particular case, President Ford announced that the substance of these letters had been made public, not ascribed to correspondence, but in fact had been made public.

The reason President Ford decided not to release these letters was to maintain the principle of confidentiality of Presidential correspondence. We do have an obligation to tell the Congress about obligations which the country has undertaken. That was done in many public statements in 1973, and they were made moot by congressional actions and after that it was not an issue.<sup>2</sup>

<sup>9</sup> P.L. 93-148; 87 Stat. 555, enacted Nov. 7, 1973.

<sup>10</sup> 72 DEPT. STATE BULL. 721 (1975).

<sup>1</sup> The letter was made public at a news conference in Washington by Nguyen Tien Hung, former Minister of Planning of the Republic of Vietnam. The final paragraph stated:

Should you decide, as I trust you will, to go with us, you have my assurance of continued assistance in the post-settlement period and that we will respond with full force should the settlement be violated by North Viet-Nam.

N.Y. Times May 1, 1975, at 16. Also made public at the same time was a letter of November 14, 1972 from President Nixon to President Thieu which contained the following passage:

. . . far more important than what we say in the agreement on this issue is what we do in the event the enemy renews its aggression. You have my absolute assurance that if Hanoi fails to abide by the terms of this agreement it is my intention to take swift and severe retaliatory action.

<sup>2</sup> 72 DEPT. STATE BULL. 666 (1975).

On April 30, 1975, President Ford formally refused a request from Senator John J. Sparkman, Chairman of the Senate Foreign Relations Committee, to supply the documents. The President cited executive privilege, the need to keep diplomatic correspondence secret, and a desire to "leave the divisive debates over Viet-Nam behind us."<sup>3</sup>

#### MILITARY SANCTIONS

##### *South Africa (U.S. Digest, Ch. 14, §6)*

Negative votes by the United States, the United Kingdom, and France in the Security Council of the United Nations on June 6, 1975, blocked a mandatory arms embargo against South Africa called for in a draft resolution dealing with the situation in Namibia and sponsored by Cameroon, Guyana, Iraq, Mauritania, and Tanzania. The vote, which came after a week of debate and unsuccessful efforts to find acceptable middle ground, was 10 to 3, with Japan and Italy abstaining.

The five-state draft resolution,<sup>1</sup> in addition to reciting several condemnations and demands of South Africa, specifically declared that the Council, "acting under Chapter VII of the United Nations Charter," determined that the illegal occupation of Namibia constituted "a threat to international peace and security" and decided that all states should prevent any supply to South Africa of arms, ammunition, aircraft, vehicles, military equipment, or spare parts, or any activities in their territories that might promote such supply. The draft further decided that the embargo should remain in effect until it was established to the satisfaction of the Council that the illegal occupation of Namibia by South Africa had been brought to an end.

The United States, the United Kingdom, and France made clear from the beginning of the discussions that they would oppose any reference to Chapter VII of the UN Charter, which concerns threats to the peace, breaches of the peace, and acts of aggression, and authorizes the application of sanctions. In a statement before the Security Council on June 3, 1975,<sup>2</sup> Ambassador John Scali, U.S. Representative to the United Nations, noted that there had been some forward movement in Namibia in the last six months, although not enough, and recommended that the Council consider South Africa's offer to resume the dialogue on Namibia with a mutually acceptable representative of the Secretary-General and to enter into discussions with African leaders, the President of the UN Council for Namibia, and the Special Committee on Namibia of the Organization of African Unity.

Following the rejection of the five-state draft resolution on June 6, 1975, Ambassador Scali made a statement in explanation of the U.S. vote, excerpts from which follow:

On behalf of my Government, I have voted "no" on draft resolution S/11713 with grave reluctance and concern. The power of the Perma-

<sup>3</sup> N.Y. Times, May 2, 1975, at 17.

<sup>1</sup> UN Doc. S/11713, June 6, 1975.

<sup>2</sup> UN Doc. S/PV. 1825, June 3, 1975, at 46.

nent Members of the Security Council to cast a veto is a right that must be exercised after the most careful and solemn consideration. Indeed, this occasion marks only the seventh time in the twenty-nine year history of the United Nations that the United States has found it necessary to do so.

But my Government believes that the situation in Namibia, however illegal, however unacceptable to the international community does not constitute a threat to international peace and security. We recognize that many of the states represented around the Security Council table have a different view. But we are obliged to make our own careful estimate of the conditions which we believe to exist and to act accordingly within the Charter of the United Nations, which all of us have pledged to uphold. . . . we cannot accept the view that there exists a threat to the peace in Namibia in a situation where the wrongdoer, South Africa, has offered, even if on terms not entirely to our liking, to enter into discussions with the organized international community on the objective of self-determination for Namibia.

The United States wishes to draw attention to the praiseworthy efforts of several members of the Council in seeking to draft a resolution which all members could have supported. . . . My Delegation is gravely disappointed that these serious efforts to find an acceptable middle way have failed.

\* \* \* \* \*

. . . the United States for twelve long years has followed a policy of banning all arms and military supplies to South Africa. We have done so voluntarily as a matter of principle—deliberately—to avoid encouraging Pretoria to think the United States will sacrifice national principle for military or financial gain. We will continue to uphold principle. We pray we have not lost momentum in the struggle for freedom and justice in southern Africa.<sup>3</sup>

George Aldrich, Deputy Legal Adviser of the Department of State, in a memorandum of June 10, 1975, to Ambassador Nathaniel Davis, Assistant Secretary of State for African Affairs, commented on the legal issues involved in the veto by the United States and others of mandatory sanctions against South Africa in respect of Namibia. He expressed the opinion that the veto could not be justified by resort solely to legal principles, its principal justification being that it was right as a matter of policy. While noting that the policy arguments relating to South Africa could doubtless be buttressed by reference to the UN Charter and the inappropriate nature of Chapter VII sanctions, he stated that law did not determine and could not have determined the U.S. veto. He could not, he said, advise asserting that Chapter VII could not lawfully be invoked in the Namibian case. The following is an excerpt from Mr. Aldrich's memorandum:

There is no doubt that Chapter VII of the Charter was designed with interstate conflicts in mind, not unique situations such as Namibia. On the other hand, as revealed by the Rhodesian case, the concepts of threat to the peace, breach of the peace, and act of ag-

<sup>3</sup> UN Doc. S/PV. 1829, June 6, 1975, at 76. See also *Press Release* USUN-64(75), June 6, 1975.

gression can legitimately be interpreted by the U.N. Security Council as covering situations other than normal interstate conflict. Unless we were to reverse our position in the Rhodesian case and consider that unique invocation of Chapter VII mandatory sanctions as unlawful, it would be extremely difficult to consider the invocation of Chapter VII unlawful with respect to Namibia—which the International Court of Justice has held to be unlawfully occupied by South Africa. Quite apart from the law, it would not, I believe, be in our national interest to argue that the Security Council lacks the power to determine in its discretion, that an illegal occupation is an act of aggression.

... Chapter VII was designed to give the Security Council authority to deal with the most serious illegal uses of armed force by one state against another and has been invoked only once for the purpose of imposing mandatory sanctions during the history of the Charter. All too many wars have proceeded unaffected by Chapter VII. Although it may provide legal authority for sanctions with respect to Namibia, the United States believes that such sanctions would be neither useful nor appropriate for dealing with the present situation in Namibia. . . .<sup>4</sup>

#### ARMS CONTROL AND DISARMAMENT

##### *Non-Proliferation of Nuclear Weapons (U.S. Digest, Ch. 14, §7)*

On June 6, 1975, the Department of State sent a note to the Embassy of Italy in Washington expressing the view of the U.S. Government regarding the application to nuclear explosive devices of the prohibitions in Articles I and II of the Treaty on the Non-Proliferation of Nuclear Weapons (NPT).<sup>1</sup> The Italian Embassy on May 2, 1975, the date of deposit by Italy of its ratification of the Treaty, had delivered to the Bureau of European Affairs of the Department a note confirming a statement regarding the Treaty which the Italian Government had previously included in a note dated January 28, 1969, the date of its signature of the Treaty. In point eight of its statement, the Italian Government observed "that the prohibitions of Articles I and II of the Treaty—even within the general spirit of the NPT—refer only to nuclear explosive devices not distinguished from nuclear weapons; and that therefore when the day comes when technological progress permits the development of peaceful explosive devices as distinguished from nuclear weapons, the prohibition will not apply to their manufacture and use."<sup>2</sup>

The Department's note of acknowledgment of June 6, 1975, stated in part:

The Department of State affords itself of this opportunity to advise the Embassy of Italy in regard to point eight of its note that the prohibitions contained in Articles I and II of the Treaty on the Non-Proliferation of Nuclear Weapons apply not only to nuclear weapons. The Treaty specifically applies prohibitions against both "nuclear weapons" and "other nuclear explosive devices," and any attempt to

<sup>4</sup> Dept. of State File No. P75 0105-2337.

<sup>1</sup> TIAS No. 6839; 21 UST 483; 7 ILM 809 (1968), *entered into force* for the United States March 5, 1970.

<sup>2</sup> Department of State translation.



erode this comprehensive language is, in the view of the United States Government, inconsistent with the object and purpose of the Treaty.<sup>3</sup>

The Department also advised the Embassy that the latter's note of May 2, 1975, would not be circulated by the Government of the United States of America to the governments of other parties to the Treaty, since the U.S. Government had not received the Embassy's note in its capacity as depositary government pursuant to the Italian Government's ratification of the Treaty.

#### WAR POWERS OF THE PRESIDENT AND THE CONGRESS

##### *Presidential Powers (U.S. Digest, Ch. 14, §8)*

On April 16, 1975, the Office of the Legal Adviser of the Department of State supplied to the Senate Foreign Relations Committee a legal memorandum entitled "Executive Authority to Introduce United States Forces into Hostile Situations to Evacuate U.S. Citizens and Foreign Nationals." At the time, the Committee had under consideration President Ford's request for clarification of the legislative restrictions on the use of U.S. military forces in Southeast Asia. In addition to upholding the President's authority to use military force to protect U.S. citizens abroad, the Department's memorandum asserted the authority of the executive to use the armed forces for evacuation of foreigners, provided the forces did not become involved in hostilities. The legal memorandum follows:

##### *The Constitutional Authority of the President*

From the time of Jefferson to the present, American Presidents have exercised their authority under the Constitution to use military force to protect U.S. citizens abroad. Instances where this authority has been exercised in the absence of any legislative sanction include the Boxer Rebellion in China in 1900, the landing of Marines in Nicaragua in 1926, and many others. (A partial listing of such instances is attached as an annex to this memorandum.)

The nature and basis of this authority was succinctly described by former President Taft. In 1916, after his term of office had expired, he wrote:

He [the President] has done this [used military force to protect Americans] under his general power as Commander in Chief. It grows not out of any specific act of Congress, but out of that obligation, inferable from the Constitution, of the Government to protect the rights of an American citizen against foreign aggression . . . . (William Howard Taft, *The President and His Power*, (1967) p. 94-95 (originally published in 1916).)

This remains the position of the executive branch.

The courts also have recognized the authority of the executive branch to take military action to protect U.S. citizens abroad. In the *Slaughterhouse Cases* (83 U.S. (16 Wall.) 36, 79 (1872)) the Supreme Court said of the Government's responsibility to its citizens abroad:

Another privilege of a citizen of the United States is to demand the care and protection of the Federal Government over his life, liberty, and property when

<sup>3</sup> Dept. of State File No. P75 0091-1911.

on the high seas or within the jurisdiction of a foreign government. Of this there can be no doubt nor that the right depends upon his character as a citizen of the United States.

In *Durand v. Hollins* (8 Fed. Cas. 111, 112 (1860)) a Federal court in New York said of our duty to protect citizens abroad:

Now, as it respects the interposition of the executive abroad, for the protection of the lives or property of the citizen, the duty must, of necessity, rest in the discretion of the President. Acts of lawless violence, or of threatened violence to the citizen or his property, cannot be anticipated and provided for; and the protection, to be effectual or of any avail, may, not unfrequently, require the most prompt and decided action . . . . The great object and duty of government is the protection of the lives, liberty, and property of the people composing it, whether abroad or at home; and any government failing in the accomplishment of the object, or the performance of the duty, is not worth preserving.

Finally, in *In re Neagle*, (135 U.S. 1 (1889)) the Supreme Court suggested that the President's duty to "take care that the laws be faithfully executed" might go so far as to authorize action to enforce "rights, duties and obligations growing out of . . . our international relations," including, by implication, our obligations to protect our citizens abroad. In support of this suggestion the Court recounted an incident involving one Martin Koszta, a native of Hungary who had at the time only declared his intention of becoming a U.S. citizen. According to Mr. Justice Miller:

While in Smyrna he [Koszta] was seized by command of the Austrian consul general at that place, and carried on board the *Hussar*, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war *St. Louis*, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hulsemann, the Austrian Minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. (135 U.S. at 64)

Mr. Justice Miller ends his discussion of this curious incident by pointing out that Captain Ingraham's actions lacked any congressional authorization, implying that none was needed.

#### *The Scope of the Various "Combat Activities" Statutes*

We do not believe that there is any necessary conflict between the President's constitutional authority to take military action for the limited purpose of protecting American lives and the various statutes which have been enacted since June of 1973 prohibiting the use of appropriated funds for the introduction of U.S. forces into hostilities in Indochina. The legislative history of these statutes and subsequent statements made by members of Congress who were instrumental in their enactment, make it clear, we believe, that the Congress did not intend by these statutes to circumscribe this constitutional authority of the President.

In discussing the meaning of the Addabbo Amendment to the Fiscal Year 1974 Continuing Resolution, one of the earliest enactments in this series of coextensive restrictions, Congressman Addabbo discussed the precise point at issue here. He said in response to questions from the former House Minority Leader:

The gentleman from Michigan is speaking of protective action. I am speaking of direct combat action by our forces. We are not amending the Constitution here this afternoon; we are taking a congressional prerogative. The President still has, as Commander in Chief, certain war powers and if any place in this world our forces are threatened or attacked he can move for the moment . . . .

Representative Ford then asked if it was correct that Congressman Addabbo was saying "that the President as Commander in Chief has certain constitutional military responsibilities and opportunities . . . *which would go beyond the limitation in this amendment. . . .*" (Emphasis added.) Congressman Addabbo responded "his rights under the Constitution as Commander in Chief, yes". (*Congressional Record*, June 26, 1973, page H-5365.)

On August 3, 1973—after the first of these statutes was enacted but before their effective date—Admiral Moorer, then Chairman of the Joint Chiefs of Staff, said in executive session testimony before the Senate Foreign Relations Committee:

[T]he only time that I think I said we might . . . use retaliatory fire was in the event we were trying to rescue Americans. I think you accept that as being—I do—a worldwide authority when we get into that type of crisis.

Chairman Fullbright said that he did accept the authority, though he also suggested that we should not create a situation making such action necessary. (Moorer testimony before the Senate Foreign Relations Committee, August 3, 1973, page 40.)

One might ask, if the President's authority to take military action to rescue Americans is so clear, why has the Congress been requested to enact legislation clarifying that authority? The answer is that the executive branch believes our efforts to evacuate Americans, if that becomes necessary, should, in view of the national concern about the role of the United States in Indochina, be supported by the Congress as well as the constitutional authority of the President. Our national response to such an emergency should be a united one in which the legislative and the executive branches are joined in their resolve. Possible disagreements over interpretation of the Constitution or the various statutes relating to Indochina should be set aside. In dealing with a matter as important as protecting the lives of American citizens there should be no dissension within our Government on the question of taking military action if necessary for the limited purpose of safely evacuating Americans from places of danger.

With regard to the authority of the President to employ the armed forces to evacuate foreigners from places of danger, it is clear that the various statutes restricting our involvement in hostilities in Indochina do not operate to prevent the President from using the armed forces for the evacuation of foreigners so long as those forces do not become involved in hostilities. We acknowledge that the President may not order U.S. forces into combat in Viet-Nam for the purpose of evacuating Vietnamese and third-country nationals without congressional authorization, except where a limited number of foreigners can be

evacuated in connection with an evacuation of Americans without materially changing the nature of such an effort. Because we believe we have a real responsibility to the many Vietnamese who have been associated with the United States for many years, and because we recognize that it might not be possible to evacuate these people to safety without some limited involvement in hostilities by U.S. forces, we are seeking authorization to take the minimum military action necessary to achieve this limited purpose should the worst come to pass.<sup>1</sup>

<sup>1</sup> Dept. of State File No. P75 0121-2172.

## JUDICIAL DECISIONS

ALONA E. EVANS

### *International air transport—terrorist attack on airport terminal—carrier's liability—1929 Warsaw Convention*

EVANGELINOS v. TRANS WORLD AIRLINES, INC. Civil Action No. 74-165. U.S. District Court, W.D. Pa., June 12, 1975.\*

Plaintiffs brought an action for damages against defendant air carrier for injuries which they had sustained in the course of an attack on the transit lounge of the Athens airport by members of the Black September Organization on August 5, 1973. At the time of the attack, plaintiffs had been waiting in line for the security search, prior to boarding defendant's flight to New York. Invoking Article 17 of the 1929 Convention for the Unification of Certain Rules Relating to Transportation by Air (Warsaw Convention) (49 Stat. 3000; 137 LNTS 11) which provided for carrier liability for damages for injuries occurring "in the course of any of the operations of embarking or disembarking," together with the absolute liability limit of \$75,000 provided in the 1966 Montreal (IATA) Agreement (31 Fed. Reg. 7302 (1966)), plaintiffs moved for partial summary judgment on the issue of absolute liability. Defendant objected that it incurred no liability on the ground that Article 17 did not reach injuries sustained in the terminal building and moved for partial summary judgment on the issue of liability. The District Court granted defendant's motion.

Reviewing the history of the Warsaw Convention, Judge Snyder pointed out that a distinction had been drawn between carrier liability for injuries to passengers (Art. 17) and carrier liability for damage to goods and baggage (Art. 18). In the former case, liability was limited to accidents occurring on board an aircraft or during embarkation or disembarkation whereas in the latter case liability was more broadly defined as accruing from the time the goods or baggage were placed in the carrier's charge. The Court disagreed with the holding of the District Court for the Southern District of New York in *Day v. Trans World Airlines, Inc.* (73 Civ. 4105-CLB (cited by court)),<sup>1</sup> a personal injury suit which arose out of the same incident in the Athens airport. In *Day*, the District Court took the view that embarkation involves eleven separate acts by the passenger, ranging from presenting his ticket to the check-in counter to walking on board the aircraft, and that once this sequence had begun the process of "embarkation" could be said to have begun, hence that the carrier's liability under Article 17 had been engaged. According to this theory, a passenger in plaintiffs' position at the time of the attack would be embarking. Judge

\* Text of decision provided by Judge Edward Dumbauld.

<sup>1</sup> 14 ILM 811 (1975).

Snyder, however, considered that *Day* "extend[ed] the liability of the signatories to the Montreal Agreement under the Warsaw Convention far beyond anything that was within the contemplation of the parties. This, the Court [did] . . . not feel justified in doing." (Civil Action No. 74-165, 13-14). In his opinion, the analysis in *Day* of the steps involved in embarkation applied as well to the reverse process of disembarkation. In several cases, carrier liability had been denied in regard to accidents or other injuries which had befallen passengers following disembarkation. He stated that "passengers . . . waiting in line to proceed to the last gate of the terminal, . . . were not within the 'operations of embarkation'" (*ibid.*, 16), and hence that the carrier incurred no liability under the Warsaw Convention and the Montreal Agreement.

*War—captured or abandoned property found in combat zone—South Vietnam*

MORRISON v. UNITED STATES. 492 F.2d 1219.  
U.S. Court of Claims, Feb. 20, 1974.

Plaintiff, a sergeant in the U.S. Army stationed in South Vietnam, while on a search-and-destroy patrol in 1968 in the Central Highlands of that country found \$150,000 in U.S. currency and 550,000 South Vietnamese piasters in a cave. He brought the present action in order to establish title to the \$150,000 as "finder" of "treasure trove." He complained that by refusing to turn the money over to him, defendant was depriving him of his property in violation of the Fifth Amendment. In a recommended decision, the Trial Judge ruled against plaintiff. In a per curiam opinion, the Court of Claims adopted the recommended decision.

Trial Judge Harkins examined in detail the activities of the search-and-destroy patrol. He found that at that time plaintiff was subject to Article 103 of the Uniform Code of Military Justice which forbade military personnel from taking personal possession of captured or abandoned property found in a combat zone. As there was no question that plaintiff's mission was of a military nature in a combat zone, he had no right to possession of the money found in the cave.

The Court said in part:

Field Manual 27-10, *The Law of Land Warfare* (July 1956), is a compilation and analysis of legal principles that relate to the conduct of land warfare. It is based upon treaties ratified by the United States, statutory law, and applicable custom. The purpose of the manual is to provide authoritative guidance to military personnel.

Chapter 6 of FM 27-10 deals with military relationships in occupied territory. Although the rules set forth in Chapter 6 "apply of their own force only to belligerently occupied areas," paragraph 352(b) provides that, as a matter of policy, the rules should "be observed as far as possible in areas through which troops are passing and even on the battlefield." Paragraph 396 declares that public property captured or seized from the enemy, private property captured on the battlefield,

and abandoned property are property of the United States. In the event it is unknown whether certain property is public or private, FM 27-10 states the property should be treated as public property until its ownership is ascertained.<sup>1</sup>

*Diplomatic immunity—inviolability of embassy archives from discovery procedure—1961 Vienna Convention on Diplomatic Relations*

RENCHARD v. HUMPHREYS & HARDING, INC. Civil Action No. 2128-72.  
U.S. District Court, District of Columbia. April 25, 1975.\*

In yet another phase of plaintiffs' effort to recover from the Brazilian Embassy and other defendants for damage to their property caused by excavation and construction on the adjacent Embassy property,<sup>1</sup> plaintiffs moved to compel discovery from defendants (Fed.R.Civ.P. 26). Defendants objected on grounds of diplomatic immunity and the inviolability of embassy archives as provided in Articles 23, 24, 27, 30, 31, and 37 of the 1961 Vienna Convention on Diplomatic Relations (23 UST 3227; TIAS No. 7502; 500 UNTS 95). The Magistrate granted plaintiffs' motion and also ordered plaintiffs to respond to defendants' request for discovery. The District Court denied plaintiffs' motion.

District Judge Flannery's decision that embassy archives cannot be reached by the discovery procedure was based upon consideration of the relevant provisions of the Convention and a letter to the Brazilian Ambassador from the Department of State which was sent after the Magistrate's ruling. The letter said in part:

I wish to assure you that the Department of State, in deciding to decline to recognize and allow sovereign immunity from suit to the Federative Republic of Brazil in the above-styled case [381 F.Supp. 382 (D.D.C. 1974); 69 AJIL 182 (1975)] . . . in no way intended to imply that the protections of the Vienna Convention on Diplomatic Relations . . . would not be available to your Embassy. . . . Thus, while it is the position of the Department of State that the Government of Brazil does not enjoy immunity from suit in the courts of the United States in the subject litigation involving the construction of the chancery building in Washington, it is also the position of the Department of State that the documents and archives of the Embassy are inviolable under the Vienna Convention as against any order of a United States court.<sup>2</sup>

Judge Flannery observed that whereas discovery was not available to plaintiffs, there was nothing to prevent defendants from claiming discovery against plaintiffs. Defendants' motion was denied, however, subject to a showing that defendants still needed discovery.

<sup>1</sup> At 1225-26.

\* Text of opinion provided by Craig S. Bamberger, Esq.

<sup>1</sup> *Renchard v. Humphreys & Harding, Inc.*, 59 F.R.D. 530 (D.D.C. 1973) [67 AJIL 789 (1973)]; Civil Action No. 2128-72 (D.D.C., July 29, 1974) [69 AJIL 181 (1975)]; 381 F.Supp. 382 (D.D.C. 1974) [69 AJIL 182 (1975)].

<sup>2</sup> Civil Action No. 2128-72 (D.D.C. April 25, 1975), 2.

*Consuls—service of subpoena—discretionary court appearance—1963  
Vienna Convention on Consular Relations*

UNITED STATES v. WILBURN. 497 F.2d 946.  
U.S. Court of Appeals, 5th Circuit, July 29, 1974.

In a divorce action in a county court in Texas, a subpoena was issued directing the Mexican vice-consul to appear as a witness and to produce the defendant's application for a Mexican tourist's card. The subpoena was not delivered. The United States then brought an action for a temporary restraining order and preliminary injunction against the clerk of the county court and the sheriff to prevent further efforts to serve the subpoena. The District Court granted the preliminary injunction. On appeal, the Court of Appeals reversed this decision and ordered the preliminary injunction vacated.

The issue was whether under the rules of the 1963 Vienna Convention on Consular Relations<sup>1</sup> a vice-consul could be compelled to appear as a witness at a trial and to produce documents from the consular archives. After reviewing the Convention, District Judge Kraft (sitting with the Court of Appeals) found that according to the provisions of Article 44 a consular officer could be subpoenaed to testify but that actual testimony or the production of documents was at the discretion of the consular officer. Judge Kraft observed that the District Court "could not justifiably assume that the State court would ignore or misapply the treaty provisions."<sup>2</sup>

*Aliens—entry by false claim to citizenship—deportation for entry without  
inspection not barred by presence of native-born children*

REID AND REID v. IMMIGRATION AND NATURALIZATION SERVICE. 43 U.S.L.W. 4387 (U.S. March 18, 1975).  
United States Supreme Court, March 18, 1975.

Petitioners, a married couple who were nationals of British Honduras, entered the United States separately by making false claims to American nationality. Subsequent to their entry, two children were born to them in this country. Deportation proceedings were brought against them by the Immigration and Naturalization Service (Service) in 1971 on a charge of entering the United States without inspection. Section 241(a)(2), Immigration and Naturalization Act of 1952 as amended, 66 Stat. 163; 8 U.S.C. §1251(a)(2). Petitioners, while not disputing the Service's charge, argued that their situation was governed by §241(f) of the Act, 8 U.S.C. §1251(f), which provided:

The provisions of this section relating to the deportation of aliens within the United States on the ground that they were excludable at the time of entry as aliens who have sought to procure, or have procured visas or other documentation, or entry into the United States by fraud or misrepresentation shall not apply to an alien otherwise admissible at the time of entry who is the spouse, parent, or a child of a

<sup>1</sup> 21 UST 77, TIAS No. 6820, 596 UNTS 261.

<sup>2</sup> 497 F.2d 946, 948.



United States citizen or of an alien lawfully admitted for permanent residence.

Their deportation was ordered in administrative proceedings and affirmed by the Court of Appeals for the Second Circuit. Certiorari was granted because a different view was expressed in similar circumstances by the Court of Appeals for the Ninth Circuit.<sup>1</sup> The Supreme Court affirmed the Court of Appeals' decision in the instant case.

Mr. Justice Rehnquist pointed out that there was a line of decisions by Courts of Appeals which treated entry by fraudulent misrepresentation of United States nationality as entry without inspection. An alien so charged under the present law would be either excludable at entry under §212(a)(19), 8 U.S.C. §1182(a)(19) <sup>2</sup> or deportable after entry under §241(a)(2); petitioners' situation was governed by §241(a)(2).

It was argued on behalf of petitioners that their position was supported by the Supreme Court's decision in *Immigration and Naturalization Service v. Errico*, 385 U.S. 214 (1966). In this and a companion case involving fraudulent entry, deportation was sought under §211(a)(3)(4), 8 U.S.C. §1181(a)(4),<sup>3</sup> concerning exclusion for failure to qualify at admission as a nonquota or quota immigrant, rather than under §212(a)(19). Deportation was held to be barred by §241(f). In the instant case, however, a different situation obtained. Mr. Justice Rehnquist said:

We adhere to the holding of . . . [*Errico*], which we take to be that where the INS chooses not to seek deportation under the obviously available provisions of §212(a)(19) relating to the fraudulent procurement of visas, documentation, or entry, but instead asserts a failure to comply with those separate requirements of §211(a), dealing with compliance with quota requirements, as a ground for deportation under §241(a)(1), §241(f) waives the fraud on the part of the alien in showing compliance with the provisions of §211(a). In view of the language of §241(f) and the cognate provisions of §212(a)(19), we do not believe *Errico's* holding may properly be read to extend the waiver provisions of §241(f) to any of the grounds of excludability specified in §212(a) other than subsection 19. This conclusion, by extending the waiver provision of §241(f) not only to deportation based on excludability under §212(a)(19), but to a claim of deportability based on fraudulent misrepresentation in order to satisfy the requirements of §211(a), gives due weight to the concern expressed in *Errico* that the provisions of §241(f) were intended to apply to some misrepresentations that were material to the admissions procedure. It likewise gives weight to our belief that Congress, in enacting §241(f), was intent upon granting relief to limited classes of aliens

<sup>1</sup> *Lee Fook Chuey v. Immigration and Naturalization Service*, 439 F.2d 244 (9th Cir. 1971).

<sup>2</sup> Section 212(a)(19) provides:

Except as otherwise provided in this Act, the following classes of aliens shall be ineligible to receive visas and shall be excluded for admission into the United States:

(19) any alien who seeks to procure, or who has sought to procure, or has procured a visa or other documentation, or seeks to enter the United States, by fraud, or by willfully misrepresenting a material fact; . . .

<sup>3</sup> Subsequently amended, 79 Stat. 917 (1965).

whose fraud was of such a nature that it was more than counterbalanced by after-acquired family ties; it did not intend to arm the dishonest alien seeking admission to our country with a sword by which he could avoid the numerous substantive grounds for exclusion unrelated to fraud, which are set forth in §212(a) of the Immigration and Naturalization Act.<sup>4</sup>

Mr. Justice Brennan in a dissenting opinion in which he was joined by Mr. Justice Marshall said *inter alia* that there was "no material difference between the instant case and *Errico*. . . ." <sup>5</sup> He took the view that petitioners having attempted to enter the United States by fraud were excludable aliens under §212(a)(19) and were governed by the Court's holding in *Errico* that §241(f) constituted ground for the waiver of deportation of an alien otherwise admissible at entry regardless of the section of the statute on which the deportation charge was based. Mr. Justice Brennan concluded:

[I]f the Immigration and Nationality Act is indeed unworkable, the remedy is for Congress to amend it, not for this Court to distort its language and the cases construing it.<sup>6</sup>

*Aliens—inheritance—acquisition of title to real property by non-resident alien—law of Mississippi—1927 Treaty of Friendship, Commerce, and Consular Rights with Honduras—interpretation of treaties*

DE TENORIO v. MCGOWAN. 510 F.2d 92.  
U.S. Court of Appeals, 5th Cir., March 19, 1975.

Plaintiff, a national and resident of Honduras, brought an action to confirm her title and interest in a 37 acre tract of land in Mississippi which she claimed to have inherited from her sister, also a national and resident of Honduras, who had died intestate and who at the time of her death was the widow of an American national who had held the fee simple record title to this property from 1915 to his death intestate in 1957. During this period the original owner had lived in Panama, returning only twice to the United States for visits. At the same time, defendant, his brother, had paid the taxes on the land and had profited by it. In 1968, defendant, asserting title by adverse possession, brought an action to confirm his title. The original owner's widow, then living in Honduras, was not a party to nor notified about this suit. Title was granted by default to defendant. When the present action was initiated, defendant offered this decree as *res judicata*. In a cross-complaint, defendant contended that the widow had lost her interest in the land because she had not complied with the requirement of Article IV of the 1927 Treaty of Friendship, Commerce, and Consular Rights with Honduras (45 Stat. 2618; 87 LNTS 421) that where the laws of one state barred the inheritance of real property by a national of the other state, such national would have three years to sell the property,

<sup>4</sup> 43 U.S.L.W. 4387, 4390-91. (Footnotes by court omitted.)

<sup>5</sup> *Id.* 4391.

<sup>6</sup> *Id.* 4392.

"this term to be reasonably prolonged if circumstances render it necessary. . . ." <sup>1</sup> Under Mississippi law, a non-resident alien could not acquire title to real property. There was no evidence that the widow had undertaken to dispose of the property pursuant to the treaty provision. The District Court took the position that the decree confirming defendant's title violated the due process clauses of the Fifth and Fourteenth Amendments which were applicable under the Treaty and that the widow's interest in the land, hence that of her heir, could not be divested without due process of law and the payment of just compensation as required by Article I of the Treaty.<sup>2</sup> The Court of Appeals reversed this decision and remanded the case.

Circuit Judge Coleman disagreed with the apparent view of the District Court that the three-year time limit in Article IV of the Treaty would not run unless the alien heir had been notified about the terms of this article; failure to notify would violate the due process and just compensation provision of Article I. In the opinion of the Circuit Court, there was no ambiguity in the language of the Treaty with regard to the situation at issue. The provision of Article I applied only to a taking by a government, not to actions between private parties. The only ground for complaint about a violation of due process of law could be found in defendant's failure to notify the widow about his pending action to assert title by adverse possession which notification was required by Mississippi law and hence extended to plaintiff through the Treaty. The Court observed that an adjudication of title to property did not constitute a violation of due process under the terms of the Treaty.

With regard to the three-year time limit, Circuit Judge Coleman took the position that the widow's failure over an extended period of time to inquire into the possibility of her husband's ownership of property in Mississippi militated against extension of the time period in her favor.

Represented by counsel, as she was, in an estate which was formally administered in Panama, we must hold that Mrs. McGowan's failure over a period of nearly twelve years to have the records examined, or to make any inquiry whatever, although assisted by counsel, totally negates the existence of *circumstances necessitating* a prolongation of the three year period in which she had the clear right to sell this land and receive the proceeds.

To hold otherwise would be to say that the Treaty Makers intended that property rights within their respective jurisdiction may be left in limbo for so long as alien owners choose not to make inquiry as to the possible existence of title, open and available to the world. This could not further, but would damage, the property rights of the citizens of either jurisdiction, something they both had a duty to protect and no doubt intended to protect.<sup>3</sup>

The Court found no merit in plaintiff-appellee's argument that defendant-

<sup>1</sup> 510 F.2d 92, 96. (Quoted by court; footnotes by court omitted.)

<sup>2</sup> 364 F.Supp. 1051 (S.D. Miss. 1973); 68 AJIL 533 (1974).

<sup>3</sup> 510 F.2d 92, 99 (emphasis by court).

appellant was in a fiduciary relationship to the widow. Nor was there merit in plaintiff-appellee's contention that she had been denied equal protection of the law in that Mississippi law allowed inheritance of real property by non-resident nationals of Syria and Lebanon. The Court observed that this argument had not been made in proceedings below and that if this special proviso of the statute were invalidated, plaintiff-appellee would still be left in the position of not being able to inherit under Mississippi law.

Circuit Judge Godbold, dissenting, argued that defendant-appellant was a fiduciary for his brother and the latter's widow, and as such, he was under an obligation to notify the widow about her interest in the property. In his opinion, the three-year time period should have been extended, as provided in Article IV, until such notification had been made.

*Extradition—double criminality—double jeopardy—conviction in absentia—1842 Webster-Ashburton Treaty—1889 Extradition Treaty with Great Britain (Canada)*

UNITED STATES *ex rel.* BLOOMFIELD v. GENGLER. 507 F.2d 925.  
U.S. Court of Appeals, 2d Circuit, Dec. 11, 1974.

In companion cases, two United States nationals petitioned for writs of habeas corpus, challenging their extradition to Canada. Petitioners had been tried in Canada on three charges of conspiracy to traffic in hashish. Their case had been dismissed because of a discrepancy between the charges and the proofs adduced at the trial. Petitioners then returned to the United States. On appeal by the Crown, the dismissal was reversed and a judgment of conviction for conspiracy to import hashish was entered against petitioners together with a mandatory sentence of seven years' imprisonment. Canada then requested the extradition of petitioners, which was granted. Petitioning for writs of habeas corpus, they argued that given the circumstances of their conviction in Canada, extradition would violate the double criminality provision of Article X of the 1842 Webster-Ashburton Treaty, 8 *Stat.* 572. Specifically, they contended that the procedure of appeal followed in Canada would not be admissible in either a New York court or in a Federal court because it placed them in double jeopardy. Extradition under these conditions would amount to a denial of their constitutional guarantee of due process of law. The District Court denied their petitions. The Court of Appeals affirmed this decision.

Circuit Judge Oakes agreed with appellants that the procedure followed in their case in Canada would have constituted double jeopardy in the United States. He pointed out, however:

Their argument, nevertheless, does not take away from the proposition that appellants were convicted under Canadian law, that under existing federal law conspiracy to import hashish is criminal, and that the record evidences sufficient "evidence of criminality" to have justified a trial of the case. This is all that the treaty requires. Since appellants have not served their sentences, they are extraditable under

the Extradition Convention between the United States and Great Britain, Art. VII, 26 Stat. 1508 (1889), and 18 U.S.C. §3184.<sup>1</sup>

The Court found no merit in appellants' argument based on denial of due process of law. They apparently offered no complaint regarding the Canadian trial procedure, nor did they appeal the decision of the Appeal Division. The Court observed:

Our "sense of decency" is not shocked either by this Canadian conviction or by the tough, apparently mandatory sentence of seven years; the importation of drugs across foreign border lines is a serious offense, whatever argument can be made for "decriminalization" in this country.<sup>2</sup>

Judge Oakes did not consider that appellants had been convicted in absentia, as they had voluntarily left Canada while the criminal proceedings were still pending. Appellants' attempt to argue on appeal that the evidence against them did not warrant extradition was unsuccessful. Judge Oakes pointed out that, within the limited scope of review of the dismissal of a petition for a writ of habeas corpus, he found that enough evidence had been submitted to sustain the conclusion that the appellants were guilty of the charges contained in the extradition request.

*Jurisdiction—irregular recovery of fugitive offender*

UNITED STATES *ex rel.* LUJAN *v.* GENGLER. 510 F.2d 62.  
U.S. Court of Appeals, 2d Cir., Jan. 8, 1975.

Petitioner, a national and resident of Argentina, sought his release from jail on a writ of habeas corpus on the grounds that, as he had been forcibly abducted from Bolivia and brought into the United States for trial on charges of conspiracy to import and sell narcotics, he had been brought within the jurisdiction of the District Court in violation of due process of law. It appeared that petitioner had been hired to fly one Duran from Argentina to Bolivia. On arrival, petitioner was seized by Bolivian police and subsequently placed on board an aircraft bound for New York. Duran and the Bolivian police were said to have been working with American agents in this venture. Lujan filed his petition after the District Court's in personam jurisdiction had been successfully challenged in a similar factual situation in *United States v. Toscanino* 500 F.2d 267 (2d Cir. 1974); 69 AJIL 406 (1975)). The District Court in the instant case, however, dismissed Lujan's petition. On appeal, the Court of Appeals affirmed this decision.

Reviewing *Toscanino*, Chief Judge Kaufman distinguished that situation from petitioner's situation. The Court said:

Yet in recognizing that *Ker* [*Ker v. Illinois*, 119 U.S. 436 (1886)] and *Frisbie* [*Frisbie v. Collins*, 342 U.S. 519 (1952)] no longer provided a carte blanche to government agents bringing defendants from

<sup>1</sup> 507 F.2d 925, 928. (Footnotes by court omitted.)

<sup>2</sup> *Ibid.*

abroad to the United States by the use of torture, brutality and similar outrageous conduct, we did not intend [in *Toscanino*] to suggest that any irregularity in the circumstances of a defendant's arrival in the jurisdiction would vitiate the proceedings of the criminal court. In holding that *Ker* and *Frisbie* must yield to the extent they were inconsistent with the Supreme Court's more recent pronouncements we scarcely could have meant to eviscerate the *Ker-Frisbie* rule, which the Supreme Court has never felt impelled to disavow. Although we cited other cases in *Toscanino* as evidence of the partial erosion of *Ker* and *Frisbie*, the twin pillars of our holding were *Rochin v. California*, 342 U.S. 165, 72 S.Ct. 205, 96 L.Ed. 183 (1952) and *dictum* in *United States v. Russell*, 411 U.S. [423] at 431-432, 93 S.Ct. 1637 [1973], both of which dealt with government conduct of a most shocking and outrageous character. . . .

The cruel, inhuman and outrageous treatment allegedly suffered by *Toscanino* brought his case within the *Rochin* principle and demanded that we provide him a remedy. Since there was no "fruit" of the abduction which could be suppressed other than the conviction which ensued, we concluded that the sole effective remedy was to order *Toscanino's* release if he proved his allegations. 500 F.2d at 275.<sup>1</sup>

Petitioner did not allege, however, that he had been abused or otherwise mistreated. With respect to him, the Court pointed out:

In sum, but for the charge that the law was violated during the process of transporting him to the United States, Lujan charges no deprivation greater than that which he would have endured through lawful extradition. We scarcely intend to convey approval of illegal government conduct. But we are forced to recognize that, absent a set of incidents like that in *Toscanino*, not every violation by prosecution or police is so egregious that *Rochin* and its progeny requires nullification of the inductment.<sup>2</sup>

Whereas it was arguable that *Toscanino's* abduction constituted a violation of Article 2(4) of the UN Charter and Article 17 of the Charter of the Organization of American States in that force was used by one state within the territory of another and *Toscanino* had alleged that Uruguay had taken cognizance of his abduction, petitioner here did not allege that either Argentina or Bolivia had objected to his abduction. Chief Judge Kaufman concluded that

This omission is fatal to his reliance upon the charters. The provisions in question are designed to protect the sovereignty of states, and it is plainly the offended states which must in the first instance determine whether a violation of sovereignty occurred, or requires redress . . . [T]he failure of Bolivia or Argentina to object to Lujan's abduction would seem to preclude any violation of international law which might otherwise have occurred.<sup>3</sup>

Circuit Judge Anderson, concurring, emphasized the Second Circuit's rule based on *Toscanino* that there is no violation of due process of law where a foreign national is abducted abroad and brought before the court of

<sup>1</sup> 510 F.2d 62, 65-66 (emphasis by court). (Footnotes by court omitted.)

<sup>2</sup> *Id.* 66.

<sup>3</sup> *Id.* 67.

correct jurisdiction in this country as long as the accused has not been subjected to cruel and inhumane treatment in the process.

*Jurisdiction—bankruptcy—foreign banking corporation*

IN THE MATTER OF ISRAEL-BRITISH BANK (LONDON) LIMITED.

[1975] Bankruptcy Court Decisions 528.

U.S. District Court, S.D.N.Y., Dec. 19, 1974.\*

In August 1974, the High Court in London appointed a Receiver and Provisional Liquidator of the property of the Israel-British Bank (London), Ltd., on the basis of a voluntary winding-up petition. On September 23, 1974, the Receiver filed a voluntary bankruptcy petition in New York, the place in which assets were located. The Bank was adjudicated a bankrupt on the same day. Section 4(a) of the Bankruptcy Act of 1898 as amended provides: "Any person, except a municipal, railroad, insurance, or banking corporation or a building and loan association, shall be entitled to the benefits of this Act as a voluntary bankrupt."

Two creditors of the bankrupt, Franklin National Bank and the Bank of the Commonwealth, which had attached the New York assets, filed a motion to vacate the judgment and dismiss the bankruptcy petition for lack of subject matter jurisdiction (Fed.R.Civ.P. 12(b)(1)). It was argued on behalf of the bankrupt that the Section 4(a) exception did not apply to foreign banking corporations which were not doing business in the United States, Congress having meant to exclude only national banks and banking corporations created under the laws of the various states. No case in point was cited.

Galgay J. accepted the argument and denied the motion to vacate. He said:

Foreign banking corporations not doing business in the U.S. are not subject to federal or state supervision while they are going concerns and there is no regulatory agency in the U.S. to govern their liquidation; hence they should be and are subject to the benefits of the Bankruptcy Act. . . . The effect of finding that the petitioner is within the jurisdiction of this court is to support the Congressional objective of equality of distribution and allow the trustee herein to examine the merits of the movants' claims, judgments and liens and move, if necessary, within the framework of the Act to insure such equality among creditors.<sup>1</sup>

*Jurisdiction—private arbitral award—enforcement—1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards*

PARSONS & WHITEMORE OVERSEAS CO., INC. v. SOCIÉTÉ GÉNÉRALE DE L'INDUSTRIE DU PAPIER (RAKTA). 508 F.2d 969.

U.S. Court of Appeals, 2d Cir., Dec. 23, 1974.

Parsons & Whittemore Overseas Co., Inc. (Overseas), an American corporation, brought an action to prevent Société Générale de L'Industrie du

\* Digest provided by Dr. Kurt H. Nadelmann.

<sup>1</sup> [1975] Bankruptcy Court Decisions 528.

Papier (RAKTA), an Egyptian corporation, from enforcing an arbitral award for breach of contract and sought a judgment declaring that the award could not be paid from a letter of credit which had been issued by the Bank of America to RAKTA at the request of Overseas to satisfy any penalties an arbitral tribunal might assess (9 U.S.C. §§203, 205). Plaintiff had contracted with RAKTA in 1962 to construct a paperboard mill at Alexandria and, upon completion, to operate it for one year. The project was funded through the Agency for International Development. The contract provided for arbitration of disputes. It also contained a force majeure clause. In May 1967, when construction on the project was nearly completed, tension between the Arabs and Israelis led many members of Overseas' work force to leave Egypt. On June 6, the Government of Egypt severed diplomatic relations with the United States and expelled American nationals from the country with the exception of those possessing special visas. Overseas, invoking the force majeure clause, refused to carry out the contract. RAKTA unsuccessfully sought damages for breach. The dispute was then submitted to arbitration under the rules of the International Chamber of Commerce.

The arbitral tribunal found for RAKTA on the grounds that Overseas' defense of force majeure applied only within the period from May 28 to June 30, 1967, that Overseas had not actively sought special visas for its people, and that Overseas was not justified in withdrawing from the project because the Agency for International Development would no longer fund it. RAKTA was awarded \$312,507.45 in damages for breach of contract and \$30,000 in costs. Overseas was also held liable for the payment of three-quarters of the arbitral tribunal's expenses of \$49,000. After plaintiff filed the present action, RAKTA brought a counterclaim to confirm and enter judgment on the arbitral award, arguing that the award for damages constituted a "penalty" within the terms of the letter of credit. Invoking the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (Convention) (21 UST 2517; TIAS No. 6997; 330 UNTS 3), plaintiff replied *inter alia* that the arbitral award could not be enforced as it violated the public policy of the forum (Art. V(2)(b)) and that as the controversy involved national interests, it was not a proper subject for arbitration (Art. V(2)(a)). The District Court granted summary judgment to defendant on the enforcement of the award but held that the award could not be paid out of the letter of credit. On appeal, the Court of Appeals affirmed this decision.

With regard to Overseas' argument based on public policy, Circuit Judge Smith found that although the text of Article V(2)(b) was not explicit as to how this issue should be determined, the history of the Convention indicated that, as the aim was to facilitate the enforcement of arbitral awards, a narrow reading of this provision was appropriate. Moreover, concern for reciprocity in international arbitration suggested that the public policy defense should be used circumspectly. The Court said:

We conclude, therefore, that the Convention's public policy defense should be construed narrowly. Enforcement of foreign arbitral awards



may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice. Cf. 1 Restatement Second of the Conflict of Laws §117, comment c, at 340 (1971); *Loucks v. Standard Oil Co.*, 224 N.Y. 99, 111, 120 N.E. 198 (1918).<sup>1</sup>

The Court continued:

To deny enforcement of this award largely because of the United States' falling out with Egypt in recent years would mean converting a defense intended to be of narrow scope into a major loophole in the Convention's mechanism for enforcement.<sup>2</sup>

Overseas' argument that the dispute was not arbitrable because it was affected by certain national interests was dismissed by the Court which observed that the dispute in *Scherk v. Alberto-Culver Company* (417 U.S. 506 (1974); 69 AJIL 184 (1975)) was held by the Supreme Court to be arbitrable although on examination it had more "public features" than did the present case. As for other defenses by Overseas based upon the Convention, Circuit Judge Smith found that Overseas had not been denied due process of law by reason of the arbitral tribunal's refusal to reschedule a hearing in order to accommodate one of Overseas' witnesses from whom the tribunal subsequently received an affidavit (Article V(1)(b)) and that the tribunal had not acted ultra vires of its jurisdiction in this dispute (Article V (1) (c)). Overseas' contention, based on 9 U.S.C. §10, that the award was in "manifest disregard" of the law was not relevant in the present case and probably not generally so where an international arbitral award was at issue.

With reference to RAKTA's counterclaim for payment from the letter of credit, the Court of Appeals found that no ruling was necessary as the claim could be paid out of a supersedeas bond which Overseas had posted. RAKTA's claim for damages and double costs on the ground that Overseas' appeal had been frivolous and designed as a delaying action was denied by the Court.

*Jurisdiction—loan agreement between United States agency and foreign development bank—responsibility of guarantor*

SOMALI DEVELOPMENT BANK v. UNITED STATES. 508 F.2d 817.  
U.S. Court of Claims, Dec. 18, 1974.

Plaintiffs brought an action for damages in the amount of \$358,115 with interest for losses allegedly sustained when a construction project funded by defendant was not completed. Plaintiffs or their predecessors had entered into a development loan program at low interest rates with long-term repayment with the Development Loan Fund, now the Agency for International Development (AID). A \$2,000,000 loan was authorized with provision for disbursement of amounts over \$100,000 in sub-loans to local industries by the Somali Development Bank subject to the consent of

<sup>1</sup> 508 F.2d 969, 974. (Footnotes by court omitted.)

<sup>2</sup> *Ibid.*

AID. In 1964, AID approved a sub-loan of \$190,500 to the Somali Bricks and Tiles Manufacturing Co. (Sombriti) for the purpose of building a plant near Mogadiscio. Construction was contracted to an Italian firm; subsequently, this contract was superseded by one between Sombriti and Interkiln Engineering, Inc. (Interkiln), an American corporation. Interkiln completed construction in 1968, but the plant did not go into operation. In 1971, the Somali Development Bank stopped payment to AID on the loan.

Plaintiffs argued that their losses in this venture arose, in part, from defendant's breach of the Loan Agreement—in particular, §1.02, which did not authorize the use of the funds for the construction of a brick and tile plant, and §4.06, which as a condition precedent to the issuance of a sub-loan required the borrower to show that it had established an organization to supervise a proposed project and that it had established "satisfactory procedures" for the review of applications for funds from such organization. Defendant brought a counterclaim for the unpaid balance of the loan with interest. The Court of Claims, finding that the claim sounded in tort, dismissed the case for want of jurisdiction.

Citing *United States v. Neustadt* (366 U.S. 696 (1961)), Chief Judge Cowen pointed out that "claims based on negligent misrepresentation, wrongful inducement, or the careless performance of a duty allegedly owed, are claims sounding in tort."<sup>1</sup> Apart from this conclusion, the Court observed that the evidence in the present case did not indicate that AID had assumed responsibility for initiating the Sombriti project nor for Interkiln's part in the project. AID's assistance to the project "did not create an implied contract by the Government [of the United States] to guarantee the success of the factory or the soundness of the sub-loan."<sup>2</sup> Judge Kashiwa concurred; Judge Bennett concurred in part and dissented in part.

*Jurisdiction—definition of objective territorial jurisdiction*

UNITED STATES V. FERNANDEZ. 496 F.2d 1294.

U.S. Court of Appeals, 5th Circuit, June 28, 1974.

Defendant was tried on nine counts of possessing, forging, and uttering three Social Security checks, drawn on the U.S. Treasury, which had been issued to residents of El Paso, Texas, and which had been stolen from the U.S. mails. 18 U.S.C. §§1708, 495. The checks were cashed in Juarez, Mexico, by defendant, and another, posing as the payees. Defendant was convicted in a jury trial on six of the nine counts. On appeal, he contended that the trial court had no jurisdiction over an offense which had allegedly been committed in Mexico and that the court had made various errors in the conduct of the trial, including failure to charge the jury as to the presumption of innocence. The Court of Appeals reversed the conviction and remanded the case for a new trial.

<sup>1</sup> 508 F.2d 817, 821. (Footnotes by court omitted.)

<sup>2</sup> *Id.* 822.

With regard to the issue of jurisdiction, Circuit Judge Simpson stated that the theory of objective territorial jurisdiction applied in this case as the "alleged acts of possessing, forging and uttering the Garcia and Castillo checks in Juarez were acts 'intended to produce and producing detrimental effects within [the United States]', specifically preventing the normal disbursement of Social Security funds to those lawfully entitled to receive such funds."<sup>1</sup> The Court reversed and remanded because the synergistic effect of the trial court's failure to charge on the presumption of innocence together with prejudicial remarks made by the prosecution during the trial was to deny defendant a fair trial.

*Tariffs—most-favored-nation principle—importation of merchandise comprising items originating in two different states*

KURT S. ADLER, INC. v. UNITED STATES. 496 F.2d 1220.  
U.S. Court of Customs and Patent Appeals, May 30, 1974.

Plaintiff, an importer of glass Christmas ornaments from Czechoslovakia, challenged the imposition of a 60% ad valorem duty on this merchandise. Showing that the ornaments and the bottoms of the boxes in which they were packed originated in Czechoslovakia but that the tops and inserts originated in West Germany, plaintiff contended that whereas the 60% ad valorem duty could be properly applied to that part of the merchandise originating in Czechoslovakia, the part from West Germany was dutiable at 40%. The Customs Court ruled that container and contents were subject to the same duty, *i.e.*, 60% ad valorem. The Court also denied plaintiff's charge that this conclusion violated the most-favored-nation principle. 19 U.S.C. §1881. The Court of Customs and Patent Appeals affirmed this decision. There was no evidence that the Czech merchandise was receiving less favorable treatment than merchandise from other countries imported under like circumstances.

<sup>1</sup> 496 F.2d 1294, 1296, citing *Strassheim v. Dailey*, 211 U.S. 280 (1911) and *Rivard v. United States*, 375 F.2d 882 (5th Cir. 1967); 61 AJIL 1065 (1967).

## BOOK REVIEWS AND NOTES

EDITED BY LEO GROSS

*Jus Cogens and the Vienna Convention on the Law of Treaties. A Critical Appraisal.* By Jerzy Sztucki. Vienna and New York: Springer-Verlag, 1974. Pp. 204. Bibliography.

The book under review is "a critical appraisal" by a member of the Faculty of Law of the University of Lund, Sweden of the concept of *jus cogens* in international law and of its treatment in the Vienna Convention on the Law of Treaties.

One of the two main parts of the work (pp. 6 to 96) is devoted to an examination of the existence (or nonexistence) of peremptory norms of international law prior to and independent from the Vienna Convention. This part surveys the very limited number of instances in which international tribunals or municipal courts have dealt with questions which are regarded as having some bearing on the problem of international *jus cogens*. It describes state practice, particularly claims of the voidness of treaties and the nonrecognition of treaties. Dr. Sztucki also examines state practice concerning treaty clauses which have been claimed to be rules of *jus cogens*. Under the heading "Teachings in International Law" the author analyzes very carefully the large body of literature on the subject. He also presents a "geographical review" of the literature.

According to the author, a survey of modern international practice seems to justify the conclusion that there is no evidence whatsoever of the application of the concept of peremptory norms. There is not a single judgment by an international tribunal which would declare any treaty void for illegality of its object. Nor is there, with one exception which Sztucki considers clearly erroneous, a single judgment by an organ of international arbitration or judicial settlement which declares that a norm is of a peremptory character, as distinguished from other binding norms of general international law. In the author's view, all the known cases of voidance or nullification of treaties in international practice, in fact, touch upon matters other than *jus cogens* and can be explained without resort to the concept of peremptory norms.

Sztucki's survey of modern international legal literature does not lead to similarly extreme conclusions. He finds that an overwhelming majority of modern authors support the idea that the freedom of states to contract is not unlimited and that consequently a treaty may become illegal if it goes beyond certain limits. Beyond this general thesis the opinions of writers differ very much as regards almost every aspect of the problem.

The other main part of the book (pp. 97 to 163) interprets the concept of peremptory norms as it is dealt with in the various provisions of the Vienna Convention. The Convention (Article 53) describes a peremptory norm as a norm "*accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and*

which can be modified only by a subsequent norm of general international law having the same character." The words in italics were inserted in the International Law Commission's draft at the Vienna Conference. Sztucki points out that as a consequence the concept, as set forth in the Convention, includes a consensual element and departs from the traditional meaning of *jus cogens*. The latter term was, however, retained in the text. The author contrasts this with the fact that in drafting what now is Article 62 of the Vienna Convention (fundamental change of circumstances) the International Law Commission decided not to use the term "*rebus sic stantibus*" in order to avoid its doctrinal implications.

Whatever may be said of the standing of *jus cogens* in international law at the time of the drafting of the Convention, this concept, the author admits, will certainly come into play when the Convention enters into force. The Convention left the notion of peremptory norms without a definition. The existence of a fundamental concept with an uncertain content is most discomfiting. The fact that any one of the parties to a dispute concerning the application or the interpretation of Articles 53 or 64 may submit it to the International Court of Justice for a decision does not dispel the author's misgivings. He expresses some doubt, not shared by this reviewer, whether Article 66(a) confers jurisdiction on the Court to decide disputes on *jus cogens*. He has a point when he draws attention to the fact that the disputes settlement clause will be binding only upon parties to the Convention, while a nonparty, not subject to that clause, can invoke a norm of *jus cogens* against a treaty.

The question of the emergence of a new peremptory norm which purports to modify an existing peremptory norm (Article 64) raises this difficulty: If the new norm is contained in a treaty then that treaty is void because it conflicts with the existing peremptory norm. An element of *ex injuria jus oritur* is involved here.

In one of his concluding observations the author states that as long as a public power with an unchallenged competence to establish the content of public policy does not exist in international relations, the concept of an international *jus cogens* will remain controversial. He believes that it is too early to say whether any harm has been done to international treaty relations by the introduction of the concept of *jus cogens* into the Convention. The main preoccupation of its opponents has been that it may undermine the stability of treaty relations. However, treaties have been attacked and unilaterally broken without resort to *jus cogens*, and the fear that this concept may adversely affect the stability of treaties may turn out to be exaggerated.

This book review could not repeat, or even list, the hundreds of comments and points of interpretation which Sztucki's monograph presents to the reader. The above summary and examples show, however, that it contains a comprehensive description and critical analysis of one of the most controversial issues raised by the Vienna Convention. It constitutes an invaluable contribution to the literature on an important aspect of the law of treaties.

EGON SCHWELB

*State Succession Relating to Unequal Treaties.* By Lung-Fong Chen. Hamden, Conn.: The Shoe String Press, Inc., 1974. Pp. xiii, 324. Index. \$10.00.

Many of the major issues of international law possess no "shock value" for the public at large and rarely find their way into the organs of the information media. Nevertheless, they frequently cause headaches for foreign offices and their legal advisers and in some cases make their own contribution to the development of rules of international law. Since the Second World War, the number of states participating in the practice of international law has more than doubled and there have been many instances when the newer states have contended—and, in view of their automatic majority in the General Assembly, increasingly successfully—that the rules established over past centuries are out of date and no longer valid. Such has been the case to a very great extent with the traditional rules concerning state succession, and the influence of these states is obvious in the draft articles on succession of states in respect of treaties adopted by the International Law Commission at its 26th session in 1974. The underlying basis of these rules seems to be a reaffirmation of sovereignty so that the new state is given a virtually free hand in deciding which of its predecessor's treaty obligations it is prepared to undertake.

In the past, there has been some sympathy for weaker states which have contended that they undertook obligations that were somewhat unilateral and there has been a feeling that such "unequal treaties" might properly be revised, and perhaps even renounced. The newer states tend to regard as unequal not only treaties that have given a one-sided advantage to one of the parties, but also those that they consider have given the former ruler a privilege at the expense of the local non-self-governing territory. Dr. Chen is concerned with these problems in his *State Succession Relating to Unequal Treaties*. After discussing the general theory and practice of state succession to treaties and concluding that the new states do not adopt a "clean state" approach and that the old rule forbidding an eclectic attitude has been modified in favor of equality and reciprocity (pp. 25-26), he turns his attention to defining what he means by an "unequal treaty." In his view, "based on the principles of equality and reciprocity, four standards are suggested as the criteria for determining the existence of unequal treaties. These are: (1) one party abuses its power and exerts undue influence; (2) the object of the treaty is unequal and nonreciprocal; (3) the treaty is concluded under coercion and against the free will of one party; and (4) the performance of the treaty results in one-sided burdens and one-sided advantages" (pp. 51-52). Since these conditions are neither exhaustive nor cumulative, Dr. Chen goes on to state that "during the colonial era, many treaties between European and non-European countries were not reciprocal and equal. These treaties in effect served as a tool of colonial expansion for the benefit of the colonial powers; treaty obligations were often not in accord with the interests and wishes of the colonial people. . . . In the context of decolonialization, the succession of states re-

quires that the sovereign will and equality of the new successor states be respected" (p. 52). Since political treaties may to some extent be regarded as personal, and since contemporary practice tends to support the view that a successor should be unencumbered by its predecessor's political choices, he argues that unequal political treaties, particularly when they "serve to perpetuate the interests of previous colonial powers should not be continued," although there are exceptions, for example peace treaties (p. 75).

In its advisory opinion on the Austro-German Customs Union, the World Court emphasized the totality of sovereignty and independence, pointing out that a threat to economic independence was equally a threat to independence as such. This same view permeates the ideology of those who condemn what they describe as "neo-colonialism," and this is the view adopted by Dr. Chen when he states that "one way for the new successor state to achieve economic independence is to discard unequal economic agreements . . . that exploit its natural resources or cripple sound international economic intercourse. . . . The successor state should not be forced to continue any treaty relating to concession agreements, the one-sided most-favoured-nation clause, and other commercial preferential treatment." However, since foreign investment is still likely to be necessary, and since immediate unilateral denunciation of such treaties would have unfortunate economic consequences for the successor, he contends that "the occasion of state succession provides a good opportunity for all states concerned to appraise any existing unequal economic treaties. In the process of making new economic treaties a reasonable period should be given for *de facto* application of the predecessor's economic agreements. With good faith the states concerned can adjust their economic relations to a better position and make the interests of the states concerned complementary rather than antagonistic" (p. 111). So urgent is Dr. Chen's commitment to the principle of reciprocity that he holds it "to be a prevailing principle in contemporary international law and state practice regarding succession to judicial treaties," so that any judicial treaty imposing one-sided burdens would not be valid as against a successor (pp. 139-40).

It has traditionally been the view that dispositive "real" treaties continue regardless of changes in state personality, and the ILC draft holds that succession does not have any effect on boundary treaties nor on treaties relating to the use of territory for the benefit of a foreign state or those for the benefit of all or a group of states. Dr. Chen's view is that theoretic discussion as to "real" rights is irrelevant and that the test should be "the interests of the community of nations. . . . If the unequal dispositive treaty was concluded for the implementation of the predecessor's policy or for the advantage of the predecessor, there is no reason why the successor who has suffered the one-sided disadvantages and now has different policies should continue to respect such a treaty" (p. 173). He takes a somewhat similar attitude towards unequal boundary treaties, although he agrees that until such treaties are altered the territorial status quo must be main-

tained, with the creation of the new state providing a perfect opportunity for the necessary amendments to be worked out (p. 214).

While Dr. Chen is of the opinion that it is impossible to be dogmatic about the rules of international law concerning succession so as to prevent any suggestion of an "all or nothing" approach (p. 232), his insistence on looking at treaties from the point of view of the law as it exists—or, perhaps more correctly, is alleged to exist—at the time of the succession, regardless of what it may have been at the time of the treaty, with the concomitant contention that "according to contemporary international law an unequal treaty is voidable, and thus it should be a legitimate reason for non-succession" (pp. 233, 235), leads to a suggestion that what he has succeeded in doing in his *State Succession Relating to Unequal Treaties* is to create a principle whereby the boot is transferred from the leg of one party to that of the other. While ex-colonial powers might in fact have been the victims of unequal treaties, his insistence on the freedom of new states to pick and choose as they like in the name of reciprocity may create a situation in which the other partner to the treaty is compelled to feel that it is now the victim of an unequal arrangement.

L. C. GREEN

*Multitudo Legum Ius Unum: Essays in honour of Wilhelm Wengler. Volume I: Allgemeine Rechtslehre und Völkerrecht; Volume II: Kollisionsrecht und Rechtsvergleichung.* Edited by Josef Tittel and Associates of the Institut für internationales und ausländisches Recht of the Free University of Berlin. Berlin: Inter Recht, 1973. Pp. xv, 704; ix, 917. Bibliography.

This large and diverse collection of legal writing honors Professor Wilhelm Wengler of the Free University of Berlin on the occasion of his sixty-fifth birthday. Among the contributors are distinguished legal scholars from Africa, Asia, America, Australia, and Europe. Their essays are in five languages: English, French, German, Italian, and Spanish. The two volumes, taken as a whole, constitute a learned and cosmopolitan tribute to a scholar of rare accomplishments.

The first contribution in Volume I by Fabian von Schlabrendorff, Justice of the German Constitution Court, sketches Wengler's life and gives insight into the man. The remaining thirty-four essays of Volume I deal with general legal theory and international law. Volume II comprises forty-four essays dealing with topics in the fields of private international law and comparative law. The first, by Rolando Quadri, professor of public and private international law at the University of Rome, discusses aspects of Wengler's contributions to the development of private international law. The volume concludes with a bibliography of Wengler's writings published before January 1, 1973.

A *Festschrift* lacks, by its very nature, a single theme. Accordingly, substantive discussion in general terms of the seventy-nine contributions contained in these two volumes is not feasible. Nor is there a basis for selecting a few contributions from among the many excellent pieces for



particular comment. The contributions cover, often in a very interesting and suggestive fashion, a broad spectrum of the law. Some are narrow in focus, others general. Some are essentially historical, others jurisprudential; still others have a technical interest.

For scholars in the fields of international law, public and private, and comparative law these volumes are a valuable resource. Unfortunately, *Festschriften* are not adequately covered by various indices to current legal publications; in consequence, the papers they contain are too often overlooked. Accordingly, it is appropriate to describe here, at least for the fields of public and private international law, the subjects treated in *Multitudo Legum Ius Unum*.

The public international law contributions, contained in Volume I, cover a wide range: consensus in international law; peace, war, and neutrality in contemporary international law; the individual's right to invoke the European Convention on the Rights of Man; the work of the International Law Commission; Article 2(6) of the UN Charter; unratified conventions on matters of public international law; "European Communities and the Italian Legal System"; the source of the international society and of international law in the medieval "Respublica christiana"; the evolution of the doctrine of state succession in treaties; "The United Nations and the Rule of Law"; the position of foreign investments; a discussion of the decision of the International Court of Justice in the *Barcelona Traction Light and Power Company, Limited* case; "Legal Bases for Securing the Integrity of the Earth-Space Environment"; characteristics of international law in the "Post-détente Era"; principles governing the relations between international organizations; "Germanic Literature on the Territorial Sea 18th and 19th Centuries"; "Japan's Northern Territories after World War II"; the legal situation of the seas adjacent to French territory; the drafting of Articles 10 and 11 of the UN Charter; the birth and recognition of Bangladesh; "The American Vietnamization Policy and the Geneva Accords"; spheres of influence; problems of developing and applying humanitarian international law; "Presidential Proclamations of India on Maritime Matters"; the protection of diplomats; J. J. Moser's theory of international law; and aggression as defined in the practice of states.

The contributions to the field of private international law, contained in Volume II, deal with a wide variety of topics. Quadri's article has already been mentioned above. Other topics treated are: enforcement of foreign judgments; aspects of *dépeçage*; the French law on nationality; recognition and effects of foreign divorce (three contributions); the *lex-foi* theory of choice-of-law; contemporary choice-of-law theories (two contributions); the significance of the vested rights doctrine for bilateral conflict rules; recognition by Italy of foreign filiation decisions; problems raised by non-local arbitrations; the general principles of Colombian private international law; the incidental question; the approach of the draft prepared in the early 1950's by the Commission for the Reform of the [French] Civil Code to the general principles of private international law; choice-of-forum and choice-of-law clauses in contracts; *ordre public* in Spanish private inter-

national law; self-limiting rules and party autonomy; recognition of foreign status judgments other than divorce judgments; interpersonal conflict of laws; the concept of domicile; the influence of procedural considerations on the application of foreign law; and the reciprocity principle as a norm of conflicts law.

The insights that these contributions bring to public and private international law—and their companion pieces to general legal theory and to comparative law—make these volumes an important contribution to legal literature.

ARTHUR T. VON MEHREN

*Law, Institutions, and the Global Environment.* Edited by John Lawrence Hargrove. Leiden: A. W. Sijthoff; Dobbs Ferry: Oceana Publications, Inc., 1972. Pp. xvii, 394. Index. \$20.00 (\$15.00 toASIL members).

Eight papers prepared for a conference jointly sponsored by the American Society of International Law and the Carnegie Endowment for International Peace comprise the bulk of this book. Its most striking feature is that, unlike many other collections of works of different authors and reports of conference proceedings, which tend to result in a product of uneven quality, this volume offers a most cogent, comprehensive, and imaginative study of selected transnational environmental problems. The credit for this unusual outcome belongs to all the authors for their well-researched and well-written papers, but is also due in no small measure to the editorial comments and analyses which highlight the five days of discussion sessions of the conference and serve as introductory chapters to three of the four main parts of the book.

In the opening chapter, entitled "International Institutions for the Environment," Abram Chayes, formerly the Legal Adviser of the U.S. Department of State, and now a professor of law at the Harvard Law School, discusses various alternative institutional designs. The paper was written prior to the UN Stockholm conference and Professor Chayes' recommended model, that a high level policy planning, coordination, and review unit be established within the UN Secretariat, was not the one adopted. However, practical issues raised by Professor Chayes, especially those concerning the deficiencies of the specialized agencies and the establishment of an international scientific research institute, are of continuing validity. He considers it vital that an institutional process be set up which is "capable of growth and renewal and of promoting and accommodating the specific organizational modes needed to deal with the infinite variety of new and unforeseen problems of environmental planning and management, protection and enhancement, as they arise." In commenting on Professor Chayes' paper, Professor Skolnikoff warns that if the UN system is unable to "carry out the responsibilities that in a physical sense will *have* to be performed somewhere, then nations will have no choice but to turn to or devise machinery [outside the UN] that 'works' even if it is undesirable for other important reasons."

In Part Two Mr. Hargrove raises questions of criteria and identifies three classes of such questions dealing, respectively, with criteria of international concern, of competence, and of efficiency. Mr. Nicholas Robinson's paper, "Problems of Definition and Scope," is devoted to exploring a variety of criteria which would aid "in determining the proper environmental concerns of the international community." In discussing priorities, Mr. Robinson notes: "Population control and curbing the arms race must be given primary attention with nearly simultaneous efforts at socioeconomic development (both ecologically sound development and the elimination of poverty-induced environmental ills) and at the elimination of threats to the quality of the environment by technological or industrial activity."

The discussion in Part Three relates to the scope and content of the evolving international law of environment protection. Mr. Hargrove's comments on present and prospective principles dealing with concepts of responsibility, liability, and injury to the environment and of a state's right to take unilateral protective action are thought provoking and insightful. Professor L. F. E. Goldie's paper offers a thorough appraisal of the current status of international environmental law, providing useful perspectives on the movement toward the enhancement of the environment.

The preceding discussion of the necessary legal framework is followed by five papers, in addition to the editorial comments, in Part Four entitled, "Developing Institutional Processes and Structures." While the editorial comments focus on the nature and extent of lawmaking and of centralization, and on subglobal systems, the papers range from a discussion of international standards and controls to studies of efforts and experimentation utilizing regional and bilateral agreements and institutions as environmental protection mechanisms and a case study of the IMCO experience. Mr. Daniel Serwer discusses the role of various standards, effluent charges, and price adjustments in controlling pollution. In his paper, "International Co-operation for Pollution Control," Mr. Serwer also discusses various means, including liability, subsidies, and compensation, for promoting compliance. Mr. Zdenek Slouka's paper, "International Environmental Controls in the Scientific Age," offers perceptive suggestions on the role of science and technology in the politics of international environmental management. In "The IMCO Experience," Mr. Thomas Mensah, Head of the Legal Division, Intergovernmental Maritime Consultative Organization (IMCO), describes in a concise and highly readable fashion the legal and institutional framework within which his organization operates, and summarizes IMCO's activities relating to the prevention of marine pollution.

The concluding papers are by Mr. Robert Stein on "The Potential of Regional Organizations in Managing Man's Environment" and by Professor Richard Bilder on "Controlling Great Lakes Pollution: A Study in United States-Canadian Environmental Co-operation." After careful examination of the role of various regional organizations in environmental management, Mr. Stein concludes with a recommendation that such arrangements be utilized in certain selected regions. Professor Bilder's es-

say is a probing inquiry into the achievements and failures of the U.S.-Canadian experience with the International Joint Commission. He distills several lessons from this experience which might be usefully applied in other bilateral or even multilateral contexts.

*Law, Institutions, and the Global Environment* is a most significant addition to the growing legal literature on global environmental issues.

VED P. NANDA

*Access to the Sea for Developing Land-Locked States.* Edited by Martin Ira Glassner. The Hague: Martinus Nijhoff, 1970. Pp. xi, 218.

*Land-Locked Countries of Africa.* Edited by Zdenek Červenka. Uppsala: Scandinavian Institute of African Studies, 1973. Pp. 369.

Emerging as a special interest group from under the shadow of the leadership of the "Committee of Seventy-Seven," or the "Third World," the developing land-locked states are defining their own interests and claims. One interesting facet of the current Third United Nations Conference on the Law of the Sea is the increasing restlessness of the land-locked states with some, at least, of the tenets of the leadership of the "Committee of Seventy-Seven." These countries see themselves as a special, if submerged, interest group, not only with respect to questions of access to the sea, but also of the use and enjoyment of all that the sea has to offer. To that extent they would appear to provide, at least potentially, a natural constituency for the proponents of the freedom of the high seas. Their position may not be unlike that of a poor farm laborer who may see the enclosure of a common land by his more fortunate neighbors as a deprivation of the last props of his precarious independence. Indeed, what use is the right of access to the sea if the common ocean is enclosed or wide areas bordering it are under the exclusive sovereignty of individual states?

An indication of the deeper implications of contemporary politics in law of the sea trends confronting landlocked states should be made but a further development of that theme is unwarranted. Neither book deals with it. While a reviewer may point to unmentioned themes, he should not comment on the books which were not written. He may validly suggest further lines of enquiry. The brief conspectus of a point of view in the preceding paragraph has only this intention.

The two books under review are very differently conceived and executed. They are concerned, however, not with the interest of the developing land-locked states in enjoying the common property resources of the high seas, but, assuming that enjoyment, raise the issue of access to those common property resources and assume their continued availability to all.

The book on the African land-locked states which Dr. Červenka edited, and to which he contributed the prefatory and concluding essays, as well as a study of "Swaziland's Links with the Outside World," is a collection of papers which were presented at a seminar on the "Land-Locked Countries of Africa" held in Oslo, September 24-28, 1972. The essays are grouped under seven headings. These have been formulated in a number

of disparate modes. For example, while at least one topic is in general terms, the others are in terms of geographical and linguistic groups and even of individual countries which may seem, logically, to fall into one of the larger selected geographical groups. The book's divisions would seem to have little basis in terms of traditional principles of classification. On the other hand, the divisions of the book reflect the contributors' interests and emphasize the seminar's direction.

Space does not permit even the briefest acknowledgment of all the contributors. Alfred P. Rubin's "Land-Locked African Countries and Rights of Access to the Sea" deserves a special mention. He raises interesting analytical issues in terms of the UN Charter, the legal consequences of the breakup of the colonial empires, and the transit agreements of the emerging states. There is both a general principle of law and equity in the argument that, when an empire having a coastline breaks up, the successor states which emerge in the interior should be permitted to continue enjoying the transit privileges they had when the whole region was administered as a single entity. Without saddling Professor Rubin with a responsibility he might, possibly, find irksome and unfair, one is still irresistably reminded of the creative function of private law analogies and of the possible utilities of the private law concept of "ways of necessity" which may arise, depending upon the modalities of prior use, of necessity, and of the assurance, when one tract of land is subdivided into two or more parcels. While, historically, private law analogies may have provided important guides for the progressive development of public international law, the cogency of such borrowing has, in many instances, tended to depend upon the *laissez-faire* values formerly prevailing in both the domestic and international law systems. Such values no longer enjoy the unqualified appeal that they once did, and so their justification of the analogies which once they may have effectively supported may seem, today, to be a fading potency. Be that as it may, the values underpinning private law and public international law rights of access have a different provenance. Their appeal is to the general sympathy for the felt need of a window, or a doorway, giving access to the concourse of mankind.

Apart from a special focus on Afghanistan, Bolivia, and Uganda, each of which has the special privilege of its own chapter, Mr. Glassner's study has a more generalized approach than his Dr. Červenka's. Thus Chapter 1 of his study examines the general characteristics and qualifications of land-locked states in terms of their geography, histories, politics, and economics. These characteristics are taken, as it were, as definitional, and as setting the scope and limits of what is to be presented.

Both of the books under review are significant. First, they eschew reasoning based on "necessary" or "natural" rights and look to premises of economic development and cooperation. Secondly, they signal the emergence of land-locked states as members of a special interest group with an important role to play in the progressive development of international law. Thirdly, they invite international lawyers to perform, in an im-

portant new area of endeavor, their traditional tasks of evolving, clarifying, adapting, and refining legal concepts. In the present context, this task is concerned with the evolution of law necessary for bringing the special needs of land-locked states into the ever more inclusive order.

L. F. E. GOLDIE

*Die internationale Konzession.* By Peter Fischer. Vienna and New York: Springer-Verlag, 1974. Pp. xxi, 594. Appendices. Index. Summary in English. DM 165, \$67.40.

This major work is the first broadly conceived systematic study of the law of international concessions based on primary source materials. With the aid of OPEC and several oil companies, Dr. Fischer has collected a large number of concession instruments. In an appendix, 750 agreements are indexed (ranging from the Christopher Columbus Granada concession of 1492 to the June 1, 1973 second Geneva multilateral dollar adjustment oil accord). This list is useful and indicates the scope of the massive research which underlies the book. However, it is by no means exhaustive, and there is a heavy predominance of Middle Eastern oil and certain African concessions (but no mention of North Sea oil agreements, for example).

While both municipal legal systems and individual contracts, especially if seen over a long time span and in a worldwide perspective, obviously are widely disparate, Dr. Fischer convincingly demonstrates that there is an identifiable body of rules, customs, characteristics, and notions that may be called the law of international concessions. His definition of the concept of international concessions would hardly have required the space of over 100 pages (the phrase in its final form appears on p. 101), since readers are likely to recognize such an animal when they see it. However, that initial part of the book comprises an intelligent exposition of both German and French administrative law (and some newly analyzed material on Austrian law) and rightly concludes with an emphasis on the contractual character of the instruments and on the fact that they are an outflow of the *Vertragsautonomie* of the parties.

The bulk of the study, which throughout is amply and meticulously documented on a comparative basis, is devoted to a treatment of certain main chapters of the law of international concessions. Dr. Fischer deals with all the more important topics, such as the status of the parties on either side (including in particular an analysis of the elements necessary to create an international relationship), geographical and time limitations (notably relinquishment clauses), special prerogatives of the concessionaire, tax and fiscal provisions, labor conditions etc. Some lucid pages are devoted to the rules governing conflicts between contractual stipulations and municipal legal requirements (particularly pp. 381-82).

In the section on governing law clauses, Dr. Fischer quotes (p. 354) a railway concession of 1872 which is one of the earliest instances of a reference to the general principles of law. His main proposition, which is one of the most important theses of the book, is that there is no need

to speak, as did Lord McNair, of a dichotomy between international law *stricto sensu* and general principles of law as applying to international concessions. The latter ought to be recognized as forming part of a widened notion of international law (p. 361, cf. pp. 447 and 451-52). As a consequence, clauses that do not refer to the municipal law of the grantor state are treated as referring to international law in a broad sense (p. 362). Dr. Fischer's remarks to this effect are both cogent and persuasive. A novel and brilliant analysis is made of regionally applicable most-favored-nation clauses (pp. 329 ff., 344) which are invoked in support of the author's main thesis on the theory that such a standard is one inherent in international law. Above all, Dr. Fischer's conception is designed to encourage in-depth research and development of this field of law in a constructive spirit.

On the crucial legal question of the effect of breach by the state (both under law and in enforcement proceedings), Dr. Fischer regrettably is virtually silent. His statement that this issue has been the object of exhaustive recent studies (p. 409, note 49) is not convincing. On the other hand, the only existing arbitral award of direct relevance has not and regrettably will not be published (it is referred to in note 110 on p. 437), and the sources on which to base general pronouncements are scarce. Further, earlier scholarly endeavors in the field have tended to concentrate too largely upon the abstract and absolute rules governing unilateral termination by the state, and there has been a notable lack of precisely the kind of realistic and penetrating analyses of all the complex facets of international concessions which abound in this book. It is to be hoped that many scholars will derive inspiration from it to continue the work for which Dr. Fischer has provided such a solid foundation.

J. GILLIS WETTER

*Public Papers of the Secretaries-General of the United Nations. Volume 4: Dag Hammarskjöld, 1958-1960.* Edited by Andrew Cordier and Wilder Foote. New York and London: Columbia University Press, 1974. Pp. xiv, 659. Index. \$22.50.

Much of the Secretary-General's attention throughout the period covered by this volume was directed to the events surrounding the threatening situation in Lebanon and Jordan in 1958 with the intervention of Anglo-American armed forces in the area. Throughout this time, Hammarskjöld devoted himself to reducing tensions so that foreign armed forces could be withdrawn and an international United Nations Observation Group in Lebanon (UNOGIL) substituted to keep an eye on gun-running and terrorist activities along the troubled Middle Eastern borders. Support was eventually won for strengthening the elements of peace and improving relations, thereby enabling the episode to be terminated "without much harm," as the editors put it. The experience led Hammarskjöld to believe that while certain principles could be distilled from the use of UN forces, their composition and mandates must be determined in each case on essentially a pragmatic basis. Rejecting the assumption of responsibil-

ities beyond what the organization is ready to assume, and given the differences between states, the UN must go on because it offers a better chance than traditional means for advancing truth, justice, and good sense.

Hammar-skjöld's good offices otherwise were devoted extensively at this time to aiding the newer nations, forming the UN Development Fund, fashioning the African regional economic commission, and helping devise a formula for reimbursing the costs of clearing the Suez Canal following the 1957 hostilities. Efforts to bring a UN influence to bear in Indo-China were frustrated by great power mistrust and foreign infiltration.

Among the goals stressed by the Secretary-General was emphasis upon a "diplomacy of reconciliation" to assist the nations toward harmonizing the "general desires and ideals common to all mankind," and infusing relations with what he termed the "necessary spiritual qualities" and maturity of mind needed to assure peace and cooperation.

Lawyers particularly will be interested in an address made in May 1960 in which the Secretary-General, noting that international constitutional law is still in an inchoate condition, called for a "creative evolution," to use a phrase from Bergson, through study of what is taking place constitutionally in the European Economic Community compared with the paradox of agencies bound together loosely in the United Nations, unreinforced by integration of national policies among the member states. Stressing what he termed working on the "brink of the unknown," Hammar-skjöld appealed for utilizing the failures and the limits besetting the international institution for forging a spirit of growth. By working with the experiences of nations constructively, interacting as they have during the years of the UN system, the Secretary-General believed it possible to produce a fabric of contacts, experiences, precedents, and transnational values from which, in the long run, international constitutional growth could progress.

NORMAN J. PADELFORD

*Cyprus: Reluctant Republic.* By Stephen G. Xydis. The Hague: Mouton & Co., 1973. Pp. 535. Appendix. Bibliography. Index. Gld. 86.

In this sequel to *Cyprus: Conflict and Conciliation, 1954-1958*,<sup>1</sup> Professor Xydis continues his chronicle of public diplomacy, conspiratory politics, and diplomatic bargaining related to the founding of the Republic of Cyprus through the conclusion of the Zürich and London agreements and the framing of the constitution of the new state. He relies largely on Greek sources, especially the private papers of Foreign Minister Averoff-Tossizza, in order to paraphrase and often reconstruct verbatim what was said by whom, in what sequence, and in reply to which point, for an incredible number of meetings and written exchanges that took place in the short period at issue. The book has no conclusions in the conventional sense and, despite the assertion that it is a "political, not historical study," no evident analytical structure that would reveal what exactly was in-

<sup>1</sup> Reviewed in 63 AJIL 183 (1969).



tended to be tested, or what selection criteria were used, in assembling the mass of information it contains. The text just fades out at a convenient point in history. Indeed, the author sees the possibility of a "definitive narrative" on his subject area only as a "synthesis" to be written once some similarly one-sided accounts drawing on Turkish and British sources become available.

This being so, the random use of jargon borrowed from several different schools of modern political analysis is both unnecessary and distracting. There is little point, for example, in substituting "Central Decision-Maker" (*sic*, caps. and quotes included) for "the Premier," not to speak of an "External Decision-Maker" who in fact lacks the authority to act on his own, or of "Aspiring Decision-Makers," of whom there is always a legion, unless one writes about the policymaking process in general or one wishes to obfuscate the matter at hand. As for "substate systems," "Rapoport debates," and "obnoxious-third-party" images, Xydis' book just isn't a contribution to structural-functional analysis, game theory, or social psychology.

This is not to say that the nature of the book prevented the inclusion of some highly intriguing stories. Covering, so to say, everything, the author offers fascinating glimpses into the ways the Greek underground in Cyprus, the government in Athens, and the Cyprus ethnarchy worked hand in hand to frustrate a succession of British, NATO, and neutral plans held incompatible with a quick achievement of *enosis*. Another interesting matter that comes to the fore in Xydis' book is the extent to which Archbishop Makarios, though still banished from Cyprus, dominated the landscape. He lectures, for example, to the Greek premier and foreign minister as if they were bungling amateurs; and at one point, at least in the opinion of Grivas, he appears even capable of giving instructions to the Cypriot Communists.

On a broader level, the book reflects a shift in Greek strategy from diplomatic confrontations combined with local terrorism to bilateral negotiations with the Government of Turkey. Bargaining then centers on the specific terms of a plan for an immediate grant of independence under a tripartite guarantee, as distinct from earlier Greek efforts to achieve self-determination under UN auspices. The shift occurs as the Greek protagonists in the drama begin to realize that they are losing the political support of third states, that the United Nations is in no position, or mood, to deliver *enosis* on the platter of decolonization, and that the ultimate threat of leaving NATO (ruled out by Karamanlis as too dangerous to the survival of Greece) may still not force the United States into the kind of support for the Greek cause that would turn events. Under those circumstances, independence, though less than self-determination (in the Greek vocabulary), suddenly appeared as the best available solution. It offered at least the hope of *enosis* being engineered by a Greek-dominated government of Cyprus at the first opportunity, whereas the remaining alternative of a lengthy period of self-government under British or international control, with partition as one of the possible solutions not explicitly excluded at the outset, carried with it the risk of uncertain future

bargaining position. Even so, the Greek side had to be pushed to adopt its most promising strategy, *inter alia*, by a threatening defeat in the 13th session of the UN General Assembly. This was averted in the last minute by a secret six-power caucus in New York, the proceedings of which Xydis treats rather laconically. Its outcome, however, was a crucial compromise which, in turn, made the Greek-Turkish dialogue leading to the Zürich summit possible.

If there is an implied general lesson to this book, it is that direct diplomacy beats oratorical duels as a means of achieving political results. Xydis' hero of diplomatic accommodations is Averaff-Tossizza, but his Turkish counterpart, Zorlu, actually does not lag far behind. We know now, alas, that the Cyprus solution of 1959 was not a particularly viable one, but this need not be taken as the negotiators' fault. While awaiting the next installment of Professor Xydis' Cyprus story, one can only hypothesize that even the best diplomatic techniques cannot assure the longevity of the bargain if the parties concerned view its substance merely as a tactical episode.

GEORGE STAMBUK

Puerto Rico and the International Process: New Roles in Association. By W. Michael Reisman. (American Society of International Law Studies in Transnational Legal Policy, No. 6). St. Paul: West Publishing Co., 1975. Pp. 225. \$4.25.

In October 1973 a one-day conference convened at the Carnegie Endowment in New York to discuss Puerto Rico's potential role and participation in world affairs. With Professor Myres McDougal presiding, deliberations developed around a working paper presented by his Yale colleague, W. Michael Reisman. The volume under review is a revised version of that paper incorporating some, though very few, of the comments elicited in the course of the conference proceedings.

Professor Reisman conceived his study as a policy paper aimed at an examination of the "strange limbo" in which Puerto Rico finds itself with regard to international processes. This reviewer concurs with Carnegie Endowment President Thomas Hughes that the author presents "a provocative treatment of a unique and neglected subject," *i.e.*, the international personality and involvement of the Commonwealth or Free Associated State of Puerto Rico (p. xv).

From a conceptual perspective, Part I is especially noteworthy. In it Reisman deals with the concept of free association or associated statehood as a form of political organization and expounds the status of the concept in contemporary international legal theory and practice. He proposes the designation of "principal" and "associate" to differentiate the two parties involved in a scheme of association. This categorization takes into account the factual state of affairs of two political entities of unequal power or capability bound by "formal and durable links" in their mutual relationships.

The legal premise that "from the perspective of the international legal system, association is a lawful arrangement" (p. 121), juxtaposed to the empirico-juridical fact that "Puerto Rico is a state associated with the

United States" (p. 113), leads Reisman to conclude that the Commonwealth is "an international entity rather than an integrated component of another international entity" (p. 5). Puerto Rico is consequently endowed with attributes of international legitimacy and personality and the corresponding potential competence to engage in international affairs, albeit with certain limitations. To what extent and under what conditions and constraints is the main concern of the book.

Part III dealing with Puerto Rico's options for participation in international organization affairs constitutes the core of the volume. It consists largely of an inventory of intergovernmental entities the institutional instruments and operational practices of which would permit Puerto Rican affiliation as a full or associate member or in some other way. The United Nations and its specialized agencies seem to offer viable possibilities for Puerto Rican international involvement. Among them are UNESCO, FAO, WHO, ECLA, and other organs like UNIDO and UNCTAD. Considering the Island's recent achievements in economic and social development, a subject discussed in Part II, it could conceivably make valuable contributions in the advancement of the objectives of these and similar entities. In Reisman's view this would be in the best interests of Puerto Rico, the United States, and the third parties involved.

Professor Reisman appears overly sanguine in supposing that "Puerto Rico might well be deemed an 'independent American state' as used in Article 6" (of the OAS Charter) for purposes of membership in that organization (p. 102). When this question was raised at the Carnegie conference, the OAS chief legal adviser, F. V. García-Amador, made it clear that the words "American State" in the Charter have been legally interpreted to mean a fully sovereign state. In practice Puerto Rico would seemingly find it easier to obtain participation in United Nations organs than in those of the Organization of American States.

The author does not pay sufficient attention to the potential role of Puerto Rico in Caribbean affairs and the possibilities for expansion of its activities in the region. Puerto Rico is currently seeking membership in the Caribbean Development Bank and looking toward some form of affiliation with the Caribbean Community and Common Market (CARICOM). Likewise, only two and one-half pages are allotted to bilateral relations with other countries. With the legal materials at hand, Reisman could have advanced some useful insights into this important dimension of the external relations of Puerto Rico.

This study is a valuable and timely contribution to a much neglected component of the Free Associated State of Puerto Rico. It becomes particularly relevant in the context of the work of the Joint Advisory Group on the Status of Puerto Rico which is currently reviewing the relationships between the United States and Puerto Rico, including its potential international role and participation. In this and other respects the Carnegie Endowment conference and Reisman's monograph have served a worthy purpose.

ANGEL CALDERÓN-CRUZ

## BRIEFER NOTICES

*New States and International Law.* By R. P. Anand. (Delhi: Vikas Publishing House, 1972. Pp. 116. Index.) This book, a collection of lectures delivered by Dr. Anand at several universities in India during 1970, discusses within a legal framework a wide array of contemporary concerns and demands made by a vast majority of African and Asian states. The opening chapter offers a concise historical background on the evolution and development of traditional international law, which the author notes "was passed on to the present as a legacy of colonial and imperialist age." Thus, the stage is set for the challenges by the new states to what they perceived to be the "Eurocentric nature of this law developed by and for the benefit of the rich, industrial, and powerful states of Western Europe and the United States." Initially, the thrust of the new states' challenges was on colonial issues and the convenient forum was the UN General Assembly. The author illustrates the point by briefly juxtaposing responses at the United Nations of the "old" and the "new" states to India's forcible takeover of Goa from Portugal. He, however, cautions against the overly broad generalizations which suggest that there is an extensive rejection by the new states of the present system of international law or that, whatever the extent of such rejection, it is caused by either the new states' cultural traditions or their lack of participation in the formulation of the traditional international law norms.

Dr. Anand forcefully refutes such assertions, as he has done in his earlier writing (e.g., *Role of the "New" Asian-African States in the Present International Legal Order*, 56 AJIL 395 (1962); *Asian States and the Development of Universal International Law* (1972)). He refers to the new states' attitude toward the International Court of Justice and the law of the sea to illustrate that in large measure practical and pragmatic rather than cultural or radical considerations color their thinking and action. The last chapter of the book deals with the role of international trade and aid in facilitating the much needed economic development of a vast majority of the new states. Dr. Anand makes a strong plea that the new states' demand to bring about changes in traditional international law so as to transform it into a law of protection and welfare be seriously considered. He stresses the "need for mutual accommodation of interests [if] international law is regarded as a system of reconciliation and coordination."

This short book offers a perceptive study of the current tensions between the developed and the developing world brought about by their varying perceptions of the future development of international law.

VED P. NANDA

*The Codification of Public International Law.* By R. P. Dhokalia. (Manchester: Manchester University Press; Dobbs Ferry: Oceana Publications, Inc., 1970. Pp. xvi, 367. Index. \$12.50.) This study, divided into three parts, traces the historical background of the movement towards codification. In Part One the author finds history replete with various efforts to realize the concept of unity of mankind through the establishment of a world organization and the development and codification of international law. Dr. Dhokalia begins with visions of Greek and Roman philosophers and discusses many "projects of peace and international confederation" by individuals such as Dante, Rousseau, Mill, and Kant. This

is followed by a brief look into the organized peace work of the 19th century culminating with the efforts of the League of Nations and finally the establishment of the United Nations and the International Law Commission.

In Part Two the author details various attempts at codification by individuals such as Bentham, Field, and Duplessix and by various professional groups such as the Institute of International Law, the International Law Association, and the American Society of International Law. He then gives a brief history of governmental efforts, either acting alone or in concert, especially within the framework of international conferences. The Hague Peace Conferences of 1899 and 1907 are singled out for special study. Separate sections provide a concise account of the codification attempts undertaken by the League of Nations and the Inter-American system. Part Three describes the work of the International Law Commission, focusing on the Commission's machinery and functions, and on the methods, techniques, and procedures used in the codification process. In appraising the Commission's achievements (as of mid-1960's when the study was finished), Dr. Dhokalia concludes on an optimistic note, suggesting that the Commission's products "are the milestones of progress indicative of the present-day world's farthest points of agreement." He stresses the arduous nature of the "task in formulating norms of a universal legal order in a society which lacks intensive international integration ideologically, culturally or in any other way."

The major contribution of this study lies in its presentation of a thoroughly and meticulously researched history of the codification of international law through the ages, and its special merit rests in the author's inquiry into the attempts made by so many individuals in different settings to establish authoritative structures and global law so that peoples and nations could live in peace under the rule of law. It should be noted that not all of these individuals were well-known authors and in this study some of them have been given due recognition for their work for the first time.

VED P. NANDA

*Netherlands Yearbook of International Law, Volume V, 1974.* (Leiden: A. W. Sijthoff, 1975. Pp. xii, 358. Table of cases. Index. Dfl. 45.) As in prior years, this excellent annual repository of Dutch materials on international law comprises signed articles, together with a summary of Dutch state practice, judicial decisions, municipal legislation with international impact, and a list of treaties and scholarly publications covering 1974. The articles deal with humanitarian rules in armed conflict, an interesting attempt to enforce in national courts an arbitral award against the Yugoslav Government, protection of the Rhine against pollution, navigation on international rivers, developments in disarmament law, and an incident involving rejection by the politically oriented plenary conference of the International Labor Organization of an expert committee's report placing the USSR on the Special List of states guilty of continued violations of treaties (in this case Convention No. 29 on forced labor).

In view of the forthcoming American Bicentennial and the fact that the Netherlands was the first nation to recognize the independence of the United States (and to receive John Adams as minister), it is of interest to note the statement of the Dutch Minister of Foreign Affairs in July 1973 acknowledging "the inalienable right of the people of every State freely to choose, to develop, and if desired, to change its political, economic,

social, and cultural systems, without interference in any form by any other state or group of states and with due respect to human rights and fundamental freedoms" (p. 200). A Dutch representative at the United Nations also declared that former colonial dependencies were not bound by past treaties made on their behalf, except general lawmaking treaties concluded under UN auspices. "To consider newly independent States automatically bound by these conventions seems equally acceptable as considering them automatically bound by customary international law and by the general principles of international law" (p. 206). This recalls Justice James Wilson's observation (in *Ware v. Hylton*, 3 Dall. 199, 281 [1796]) that "When the United States declared their independence, they were bound to receive the law of nations, in its modern state of purity and refinement."

Another interesting and ingenious suggestion is that the definition of a tort under Article 1401 of the Dutch Civil Code might make racial discrimination actionable as "behaviour in conflict with the due care for the person or property of others that is befitting in social relations" (p. 218). A curious case of "piracy" is also noted (p. 332). Likewise an acute distinction is made, with respect to utilization of the seas, between sovereign rights "over" some object (akin to property) and sovereign rights "to do something" (pp. 235-36).

Noteworthy among the scholarly publications listed is the ninth volume of the correspondence of Hugo Grotius, edited by B. L. Meulenbroek. A number of works appeared on immunity of states in foreign courts, the European community, and Dutch legislation on nationality and passports.

EDWARD DUMBAULD

*Foreign Relations of the United States*, 1948, Volume III, *Western Europe*. (Dept. of State Pub. No. 8779). (Washington: U.S. Govt. Printing Office, 1974. Pp. xiii, 1165. Index. \$12.90.) The main theme of most of this volume is the effort of the United States in cooperation with the countries of Western Europe to find means to resist the threat of extension of Communist power into Western Europe either by military aggression or internal subversion. The first 351 pages deal with the movement for collective military security, the antecedents of NATO. The second section, 150 pages, records efforts to strengthen security from political takeover by cooperative action to improve economic conditions through the European Recovery Program.

A first step toward collective security in Western Europe was the signing of the Brussels Treaty, March 17, 1948, by Great Britain, France, and the Benelux countries. Referring to this treaty, President Truman in a message to Congress declared the determination on the part of the United States to help the free nations of Europe to protect themselves. Bidault and Bevan, the French and British Foreign Ministers, promptly called on Secretary of State Marshall for consultations regarding implementing a wider arrangement, which would include the United States. Many serious problems were involved, including what countries should or would participate, but much progress was made and the NATO agreement was finally signed the next year.

Weakened economies and political confusion rendered two key countries of Western Europe, France and Italy, susceptible to possible Communist election victories and for a time limited their power for decisive collective action with the West. Considerable documentation is given on internal

developments in these two countries. The United States avoided political interference but strengthened the governments in office by its program of economic assistance. In elections in each country the Communists suffered decisive setbacks. A good start had been made for economic, military, and political security.

A disturbing issue to which no solution was reached in 1948 was the disposition of the former Italian colonies in Africa. The Soviet Union favored the return of the colonies to Italy—a good propaganda move to assist the Italian Communists in a national election. On the other hand, there was a demand in each colony for independence. Trusteeships were also proposed as preparation for later independence. The United States maintained a flexible position with no final commitment. Another unsettled problem in 1948 was that of the Free Territory of Trieste under British, American, and Yugoslav occupation. The firm position of the United States was stated in an instruction to the U.S. Representative at the United Nations: "One basic objective of our policy is, however, beyond any doubt: we do not intend to see Trieste fall into Yugoslav hands" (p. 507).

Relations with Portugal were improved by an order of September 2, 1948 to unblock Portuguese assets in the United States. The integration of Spain into collective arrangements for security was prevented by the fact of the dictatorial government of Franco, anathema to liberals in the United States and even more so in some Western European countries. A Department instruction of January 5 stated: "... it should be obvious that we are thinking in terms of persuading Franco to inaugurate gradual and orderly liberalization rather than to force him out" (p. 1019).

Volume III also contains minor correspondence and citations to agreements with Belgium, Denmark, Iceland, Ireland, Luxembourg, The Netherlands, Norway, and Sweden.

E. R. PERKINS

*The Future of the Law of the Sea.* Edited by L. J. Bouchez and L. Kaijen. (The Hague: Martinus Nijhoff, 1973. Pp. xi, 164. Gld. 27.50.) This volume contains the Proceedings of a Symposium on the Future of the Sea organized at Den Helder by the Royal Netherlands Naval College and the International Law Institute of Utrecht State University on June 26 and 27, 1972. In addition to a preface by Professor J. P. A. François and an opening address by Vice-Admiral E. Roest, it includes seven excellent papers written by leading specialists dealing with the most crucial problems of the marine environment. In "The Future of the Sea" (pp. 1-20) Ambassador Arvid Pardo, at present Director of Ocean Studies at the Woodrow Wilson International Center for Scholars, describes modern developments in the uses of the sea and the trend of states to extend their jurisdiction over vast areas of the sea. He recommends the adoption of a new law of the sea which would reasonably balance coastal states interests and the rights of the international community. A reappraisal of the freedom of the high seas (pp. 21-50) is undertaken by Professor L. J. Bouchez of Utrecht University. The author deals with some of the legal aspects of the relationship between the freedom of the seas and various uses of the seas as an area of communication (with an interesting proposal for the legal regime of international straits) and as an area for exploitation of natural resources, recreation, scientific research, and dumping of waste, as well as military uses other than navigation. Dr. P. Diebold, a leading geophysicist of the Shell Company, describes (with the aid of

charts, diagrams, and pictures) the mineral resources to be found in the water itself, on the bottom of the sea, and within the seabed (pp. 51-76). His study deals mainly with metal deposits and with deep water oil deposits. Dr. J. E. Carroz, of F.A.O., an expert on fisheries, maintains that despite heavy exploitation or even overexploitation of certain valuable stocks of fish, the living resources of the sea as a whole are still under-exploited. He discusses the prospects of aquaculture and the dangers of pollution. The examination of these technical aspects is followed by an analysis of the international regime applicable to fisheries. Dr. Carroz strongly advocates more international cooperation and coordination (pp. 77-94). The importance and the problems of "Oceanographic Research" (pp. 95-103) are outlined by Rear-Admiral W. Langeraar of the European Oceanic Association. In his opinion, the main obstacle to research is the distrust of developing coastal states which could be overcome by helping them to train and educate their own experts in the different disciplines of marine research. Professor du Pontavice of the University of Paris (South) deals comprehensively with the dangers of pollution, the means so far used to fight it, and the relation between the fight against pollution and the principle of the freedom of the high seas. He concludes by outlining the shortcomings of the present state and by recommending a series of measures intended to intensify and widen the scope of the fight against pollution. The volume concludes with Professor W. Riphagen's study on "The Jurisdiction of the Coastal State" (pp. 154-62). Under this modest title, the author subjects to a reexamination and reevaluation old and new basic precepts and principles prevailing in the law of the sea, in theory and practice, such as territorial sovereignty, freedom of the seas, and the functional approach to the rights and duties of states. In his opinion, the new regime to govern the seas should be a combination of old ideas, such as national jurisdiction, and new ones on international management. A system of compulsory settlement of disputes is indispensable.

Most of the articles reflect a cautiously optimistic view: it is presumed that, since humanity absolutely needs a reasonable legal system for the marine environment, states will eventually reach an adequate agreement. Let us hope that the authors' hopes and wishes will come true and that they have not the overestimated reasonableness of states.

RUTH LAPIDOTH

*The Changing Law of the Sea: Western Hemisphere Perspectives.* Edited by Ralph Zacklin. (Leiden: A. W. Sijthoff, 1974, for the Carnegie Endowment for International Peace. Pp. iv, 272. Dfl. 47; \$17.00.) This book surveys and analyzes the national legislation and practice of Western Hemisphere states with respect to claimed maritime zones. Ralph Zacklin has done a most capable job of editing the results of the research undertaken by an Inter-American group sponsored by the Carnegie Endowment to investigate legal problems of a regional character. This study covers Canada, United States, Mexico, Central America and the Caribbean, Venezuela, Brazil, Uruguay, Argentina, Chile, and Peru. An Annex contains the four 1958 Geneva Conventions as well as relevant Regional and Bilateral Instruments and Declarations.

The collection serves a useful purpose in that it brings together in one place explanations of the divergent laws and assertions in the Americas regarding national claims to marine areas. These zones include the territorial sea, the contiguous zone, the continental shelf, fisheries claims and, in a few cases, a pollution prevention region. The quality of the indi-



vidual articles varies. Several are clearly written, scholarly reviews of the particular domestic law or practice under examination. While materials on laws in the abstract can be somewhat tedious reading, the information is there. Other articles in the collection contain less objective evaluations of highly questionable unilateral actions. In these instances, the justifications advanced for coastal state appropriations of high seas areas in contravention of existing customary law are particularly unpersuasive. In this latter group, for example, are numerous references to the 1945 Truman Proclamation on the Continental Shelf. However, there is no pertinent legal analysis of the scope of the Proclamation itself or of its precise cause-effect relationship on the formulation of new norms of international law.

Negotiations at the Third United Nations Conference on the Law of the Sea have reached the stage where a 12-mile territorial sea and a 200-mile economic zone are recognized as essential elements of any comprehensive treaty package. Accordingly, domestic laws that are at variance with the results of the Conference will have to be modified by those states that become parties to the new convention. One of the main contributions of *The Changing Law of the Sea* is that it outlines in a systematic way the offshore legislation that may be affected in the Americas. In the meantime, Dr. Zacklin's work provides a valuable source of reference materials on the present maritime law and practice of North and South American countries.

MYRON H. NORDQUIST

*New Era of Ocean Politics.* By Ann L. Hollick and Robert E. Osgood. (Baltimore and London: The Johns Hopkins University Press, 1974. Pp. xi, 131. \$8.00, cloth; \$2.75, paper.) This slim book is essentially two articles, one by each author, emanating from the work of the Ocean Policy Project at the Johns Hopkins University School of Advanced International Studies. Together, the articles shed considerable light on the how and why of U.S. ocean policy formulation, a subject in dire need of illumination.

Hollick's paper, aptly titled "Bureaucrats at Sea," is a detailed exposition of the bureaucratic byplay that accompanied and, to a large extent, determined U.S. ocean policy in the critical period from 1968 to just before the 1974 Caracas session of the Law of the Sea Conference. As such, it is part of a series of very valuable articles that have earned for Dr. Hollick a highly respected position in the ranks of students of ocean politics. In the present offering, Hollick traces the development of ocean policy positions within the federal bureaucracy during the time when awareness of important new decisions in ocean law spread from State, Defense, and Interior to the National Security Council, to Treasury, and to the White House. The complexities of this process—with its interdepartmental infighting, balancing and counterbalancing, and positional shifts—are fascinating.

The article by Osgood is entitled "U.S. Security Interests in Ocean Law." It is a major contribution to the too limited body of literature addressing the question: Why does the United States place such extreme emphasis, in present ocean law negotiations, on unimpeded straits passage? Of course, the basic answer, as noted by the author, rests with the U.S. negotiators' concept of national security needs; more specifically, the official concern, in this time of expanding coastal state jurisdictions in the oceans, is for protecting U.S. naval and air mobility and U.S. access to vital re-

sources. Osgood is in general critical of the U.S. emphasis. His impressive analysis of the sorts of situations, arising within the projected international political framework of the next decade, in which a general treaty guarantee of free straits transit would be essential leads to the conclusion that such situations are few. Among other points, he suggests that the U.S. rigidity on the straits issue might be reassessed in terms of broader, more long-term ocean concerns.

Both chapters are exceptional contributions to the study of the important new era of ocean history. They will undoubtedly be sought out for decades into the future by scholars interested in learning how the ocean age began.

JON L. JACOBSON

*Scientific and Technological Revolution and the Law of the Sea.* Edited by Maria Frankowska. (Wrocław, Warsaw, Cracow, Gdańsk: Ossolineum, 1974. Pp. 153. Zl. 50.) This volume is a collection of five essays presented in 1972 by Polish legal scholars at a conference organized by the Institute of Legal Sciences of the Polish Academy of Sciences. The common theme is the impact of rapid progress in science and technology on selected aspects of the law of the sea. Three of the essays are concerned with the broad issues of offshore zones, conservation of living resources of the sea, and exploitation of deep sea mineral resources; the other two deal with the more limited matters of demilitarization of the seabed and recovery of sunken historical treasures. Each essay, although marred somewhat by occasional awkward wording in translation, is the product of careful research, documentation, and analysis. The reader will benefit from the scholarly discussion of current law of the sea issues and from an increased understanding of the methodological and policy preferences of leading Polish legal scholars.

The authors who discuss offshore zones, conservation, and deep sea mineral resource exploitation are firmly attached to the consent theory of law creation. Each relies heavily on what he considers to be the universally accepted principle of freedom of the seas and refuses to attribute legal significance to contravening principles embodied in General Assembly resolutions; any change in the law must be accomplished by explicit state agreement, not by consensus expressed in General Assembly votes. Ludwik Gelberg, for example, asserts that manganese nodules and other deep sea mineral resources are, like fish, *res nullius*, and consequently subject to appropriation by anyone; the seabed itself, on the other hand, is, like high seas water areas, properly characterized as *res communis* and not subject to appropriation by any state. Remigiusz Zaorski asserts that current law allows freedom of fishing on the high seas while imposing no significantly meaningful obligation to practice conservation measures. Wojciech Góralczyk argues the illegality of claims to the territorial sea and exclusive fishing zones that extend beyond twelve miles and expresses a concern that the proposed two-hundred mile economic resource zone might do immense damage to the principle of freedom of the seas. All three authors conclude their essays with imaginative and realistic suggestions for changes in the law that are made necessary by the scientific and technological revolution. The proposals are based on the clearly stated necessity of reconciling the specific needs of individual states with the international community interest and the imperative of accomplishing this goal through explicit state agreements.

Andrzej Skowroński provides the reader with a succinct account of the negotiations leading up to, and an analysis of the obligations imposed by,

the Treaty on the Prohibition of the Emplacement of Nuclear Weapons and Other Weapons of Mass Destruction on the Sea-Bed and on the Ocean Floor and in the Subsoil Thereof. Stanislaw Matysik, in an interesting if not entirely convincing essay, discusses legal problems relating to the recovery of historical treasures from the seabed. His principal conclusion is that such treasures are not *res nullius* because, unlike fish, they were formed by human hands and were once possessed by someone. Consequently, legal title passes to heirs or insurers, and the recoverer, although entitled to remuneration for costs and expenses, is obligated to return them to the rightful owners.

EDWARD COLLINS, JR.

*Limits to National Jurisdiction Over the Sea.* Edited by George T. Yates III and John Hardin Young. (Charlottesville: University Press of Virginia, 1974. Pp. xii, 236. Index. \$15.00.) Some of the most complex issues facing negotiators at the Third Law of the Sea Conference are those associated with offshore limits of national control. How far out onto the ocean floor should coastal state rights extend? Which countries would benefit, and which would lose from a broad continental shelf regime? What special provisions might there be for boundary delimitation in marginal seas? Questions such as these are the theme of this timely and authoritative series of essays.

The volume is divided into three parts, each of which contains two chapters. The first part focuses on Jurisdiction over the Continental Shelf, the second on Jurisdiction over the Seabed, and the third on Contemporary State Practice. The authors come squarely to grips with difficult issues, such as interpretations of the World Court's use in 1969 of the terms "adjacency" and "natural prolongation," the geographical bases for "second best" choices by states of seabed limits, and the rationale for special circumstance claims in the Arctic Basin. The book has a number of maps and tables, and the chapters are more than adequately footnoted.

The outer limits of the continental shelf are considered by L. F. E. Goldie, who suggests that in place of a "single blueprint" for a regime there should be different types of regimes for different regions; and by Luke Finlay who feels that coastal states should maintain rights to seabed resources to the outer limits of the continental rise. Northcutt Ely and J. Michel Marcoux give a detailed description of jurisdictional problems in the South China Sea, taking this as an example of a marginal sea which represents a distinct geographical unit and is separated from the abyssal ocean floor by well-defined geomorphic indices. Robert Hodgson and Terry McIntyre discuss national seabed boundary options from the standpoint of which countries would get what under various seabed proposals. Most coastal states benefit the greatest from a 200-mile limit, but there might be enough countries gaining little or nothing from this regime to succeed in blocking a 200-mile proposal. The concluding chapters are case studies of national policy with respect to jurisdictional limits in the sea. William Butler presents a scholarly account of Soviet policy, while L. C. Green gives a lucid description of jurisdictional issues in the Canadian Arctic.

The book makes no pretense to comprehensiveness. One might wish, perhaps, for more attention to historic bays, islands, and archipelagos, and multistate regional arrangements. But for what it sets out to do, *Limits to National Jurisdiction over the Sea* performs an admirable job.

LEWIS M. ALEXANDER

*Prawo Morskie. Zarys Systemu* (The Law of the Sea—An Outline of the System.) By Stanisław Matysik. (Wrocław, Warsaw, Crakow, Gdańsk: Zakład Narodowy Imienia Ossolińskich Wydawnictwo. Vol. 1. 1971. Pp. 367; Vol. II. 1973. Pp. 319.) In the interwar period Polish law of the sea consisted of Part Four of the German Code of Commerce which constituted the civil law of the sea, supplemented by various regulations dealing with the administration of maritime affairs and aiming at the protection and promotion of the Polish merchant marine. At that time, introducing new legislation in this field was far from pressing, due to the narrowness of the Polish coast and to the fact that Danzig, the main Polish port, was a Free City. After World War II, Poland's expansion to the West, its acquisition of a number of new seaports, and the significant expansion of the merchant marine and shipbuilding changed the perspective of the problem dramatically. Toward the end of 1961, a new Code of Maritime Commerce was adopted, creating a need for a new amended edition of Professor Matysik's earlier systematic treatment of the Polish law of the sea.

Professor Matysik's book (two volumes) covers all aspects of the Polish law of the sea, with a third volume (accidents on the sea) to appear in future. The book is organized in eight parts: sources of the law of the sea, the ship (administrative and property relations), the shipowner, captain, and crew (labor law, work rules, discipline, and the office of the captain) (volume I). Volume II covers maritime contracts (carriage of goods, carriage of passengers, time charter), and towage, piloting, and transshipping. An extensive annex treats of bills of lading and its new form arising out of new techniques for the carriage of goods (containers and combined carriage). A folder contains forms of three contracts recommended for use by Polish shipping firms: uniform time charter, voyage charter party, and towage contract.

The book under review is a superb piece of work, a truly comparative study, based on profound knowledge of the law of the sea, and illustrating Polish solutions by examples from main legal systems of the world, beginning with the Roman law. An important contribution to the study of the law of the sea is made by a valuable analysis of legal terms, in English, French, German, and Russian compared with Polish terminology. Indeed, the reviewer regrets that it is inaccessible to the broader public not familiar with Polish. The only jarring note is a short section (pages 19–21) on the socialist law of the sea, which contains the tired phraseology on distinctions between capitalist and socialist legal systems according to the class interests which they serve, a most inappropriate statement as regards commercial relations with capitalist countries.

K. GRZYBOWSKI

*The Management of Marine Fisheries.* By J. A. Gulland. (Seattle: University of Washington Press, 1974. Pp. viii, 190. Index. \$16.50.) Somewhat more scientifically oriented than earlier general works on the multidisciplinary process known as fisheries management,<sup>1</sup> this volume makes a unique contribution to the literature by discussing a variety of economic, scientific, and technical problems. The introductory chapters identify the range of problems involved through the examples of Antarctic whaling and North Atlantic trawl fisheries. Chapter 4, dealing with the biological

<sup>1</sup> E.g., CHRISTY AND SCOTT, *THE COMMON WEALTH IN OCEAN FISHERIES* (Johns Hopkins Press, 1965); JOHNSTON, *THE INTERNATIONAL LAW OF FISHERIES* (Yale Univ. Press, 1965).

basis of management, is a bit heavy on mathematics for the layman, but nonetheless describes in understandable detail the subject of fisheries biology as it relates to the exploitation of fish resources. In Chapter 5 the author identifies a range of possible goals in fisheries management. He criticizes the concept of "maximum sustainable yield" as a single goal and concentrates mostly on an analysis of maximization of net economic return as a management objective. Chapter 6 deals with techniques of management such as control of composition of catch, control of total amount of fishing, allocation of shares, and limited entry. Chapter 7 constitutes an analysis of the structure and capabilities of international fishery management commissions and organizations, while Chapter 8 concludes the volume with a brief look at the future. Though other works cover each of the chapters' subject matter in more depth,<sup>2</sup> Gulland has placed in one volume an introductory look at several important aspects of international fishery management.

In briefly discussing the current law of the sea negotiations, the author notes that the specific outcome is not so important as the trend toward assertion of management authority:

In whatever way the arguments are resolved, it is quite clear that there will be a much greater authority over fisheries, whether national or international, than in the past. The question then is, How well will this authority be used? . . . What is to be hoped is that in the future the growing understanding of the various problems—scientific, economic, social, and political—of fisheries management will result in the authorities concerned being able to ensure a better use of the fish resources of the world. (At 189-90)

The Gulland volume contributes significantly to that understanding and is worthwhile reading both for serious students of the problem of conserving and allocating the living resources of the sea and for those wishing a readable and understandable introduction to a rather complex subject.

H. GARY KNIGHT

*The Laws of Armed Conflicts.* Edited by Dietrich Schindler and Jiri Toman. (Leiden: A. W. Sijthoff; Geneva: Henri Dunant Institute, 1973. Pp. xxxvi, 795. Dfl. 115.) Until now the only comprehensive selection of historically important texts on the laws of armed conflict has been a recent overpriced and inadequately edited pair of volumes.<sup>1</sup> This new book therefore fills a need for private libraries and includes some texts, like the Brussels Rules of 1874, the Oxford Manual of 1880, the League of Nations Resolution of September 30, 1938 on Protection of Civilian Populations Against Bombing from the Air in Case of War, and some other materials that are difficult to find even in larger collections. It is well annotated, indicating the source of each of the texts reprinted and treaty reservations. The texts are conveniently arranged by subject matter and well indexed. There is also a chronological list of the contents. The most recent document is UN General Assembly Resolution 2936 (XXVII) of November 29, 1972. Notably lacking are documents relating to the cur-

<sup>2</sup> For example, CUSHING, *FISHERIES BIOLOGY* (Univ. Wisconsin Press, 1968) is more comprehensive on biological aspects and KOERS, *INTERNATIONAL REGULATION OF MARINE FISHERIES* (Fishing News Ltd., 1973) provides more thorough coverage of international fishery conventions and commissions.

<sup>1</sup> See review at 68 AJIL 162 (1974). The treaty texts in those volumes are incorrect in places and without bibliographic data.

rent attempts to revise the 1949 Geneva Conventions, citations to the provisions of the Treaty of Versailles relating to the use of poison gas,<sup>2</sup> or any material of the United Nations other than some General Assembly resolutions. But arbitrary lines must be drawn somewhere.

This volume is devoted to the *jus in bello*; the Editors are reserving material related to the *jus ad bellum* for another volume. Thus the absence of Hague Convention I of 1899 and Conventions I, II, and III of 1907 is not an oversight but is part of the comprehensive plan of selection.

By itself this volume is a very handy addition to a small scholarly library. When coupled with the planned companion volume of documents relating to the *jus ad bellum*, its value will be even greater. It may be hoped, therefore, that the publisher will issue a paperback edition which will bring it within the reach of the many students and scholars who would like to own a copy.

ALFRED P. RUBIN

*The United Nations and Collective Security: A Historical Analysis.* By K. P. Saksena. (Delhi: D. K. Publishing House, 1974. Pp. xii, 450. Index. Rs. 75, \$15.00.) The concept of collective security, "the primary motivating force behind . . . the League of Nations and the United Nations," Professor Saksena maintains, has "neither been effectuated nor repudiated" by experience: when a scholar, statesman, journalist, or layman "criticizes the U.N. for not meeting its responsibility, he is in a way consciously or unconsciously applying the principle of collective security in evaluating [its] performance" (p. ix). Employing the concept as embracing two basic principles: (i) any breach of the rule against use of aggressive force by a state in international relations concerns the whole international community; and (ii) such a breach should be resisted by collective action, Saksena analyzes the experience of the two world organizations in dealing with threats to and breaches of the peace, to discover the extent to which the collective security ideal has "served as an effective force . . . within the actual current of affairs" (p. 387).

The theoretical frameworks agreed upon in 1919 and 1945 differed from the ideal, and practice in both institutions differed from the norms, procedures, and aims of Covenant and Charter. The author shows this mainly through an extended review of pertinent UN cases, which differentiates his book from more theoretical collective security studies. His viewpoint as an Asian and his experiences, both as a UN Delegate and a Secretariat official, result in some interesting differences of interpretation from other studies, predominantly Western-authored, in the general peacekeeping field. Saksena finds the League experiment marked "a significant development towards a collective security system," by achieving recognition of the principle of common concern in any act of aggression. The UN Charter sought to avoid certain Covenant deficiencies by including a centralized mechanism of peace enforcement. Based on great power agreement, this was far from a perfect collective security system; but was realistic in that the Wilsonian assumption—that if *all* states agree to wage war jointly against *any* state breaking the peace, its defeat will be certain—was no longer valid in the bipolar nuclear age. The principle of common concern has been largely maintained under the United Nations, while the principle of collective action has moved "through a tacit transition" from coercive measures to a more realistic "operational concept of peacekeep-

<sup>2</sup> On the significance of that text, see Bunn, *Banning Poison Gas and Germ Warfare* . . . , 1969 *Wis. L. Rev.* 375 at 397-400.

ing." Since coercive measures could easily defeat the very purpose of collective security, that is, preventing war, this was "the best feasible course . . . designed not to punish the law-breaker but to allow those involved to disengage without further disturbance to peace" (p. 387).

The United Nations also evolved a new function, that of legitimizing the claims and acts of states, not precisely authoritatively, but with great political weight. This could mark the beginning of an essential preliminary to a collective security system in which "the collective assignment of guilt leads to collective action against the guilty as a matter of obligation"; but there is no possibility of rapid movement toward such a complete system. "In this nuclear age there is no alternative [to] political and moral pressure alone" (p. 389).

RUTH B. RUSSELL

*The United Nations and Population: Major Resolutions and Instruments.* (Dobbs Ferry: Oceana Publications, Inc.; Leiden: A. W. Sijthoff, 1975. Pp. i, 212. \$12.50.) Population represents the most serious problem of our time. Or so we are told. (Again and again). Organizations running the alphabetical gamut from Abortion Freedom League, Inc., to Zero Population Growth would have us believe that there is a world population crisis, and that this crisis is the key "in solving international problems of an economic, social, cultural, or humanitarian character."

With this in mind, the Law and Population Programme of the Fletcher School of Law and Diplomacy at Tufts University, together with the United Nations Fund for Population Activities, has now provided us with this compendium of excerpts from all UN resolutions and instruments on the subject, up to May 18, 1973. Predictably, this includes extracts from conventions on consent to marriage and discrimination against women, as well as resolutions on family planning. But it also includes materials from less clearly relevant documents such as the ILO Recommendation Concerning the Protection of Migrant Workers in Underdeveloped Countries and Territories. By actual count, the editors have included selections from 129 different documents. That makes for a very comprehensive anthology indeed. But it also makes for questions about documents black-balled and blue-pencilled. And it makes the reader wonder about the comprehensiveness of each of the excerpts.

In any event, here are the stated criteria for inclusion: (a) the intrinsic importance of the resolutions; (b) the existence of any novel features in the resolutions; (c) the usefulness of the resolutions in providing guidelines for national legislation and programs; (d) the comprehensiveness of coverage; (e) the need for a balanced presentation in terms of subject matter and geophysical regions; and (f) the relevancy of the resolutions to current United Nations activities and programs.

The inclusion of two tables of contents make the work particularly useful. In addition to a "working" nine-page table, there are thirty-two pages constituting an annotated, explanatory table of contents, but it does not have a much needed index.

ALBERT P. BLAUSTEIN

*Law of International Trade Transactions.* Edited by Rahmatullah Khan. (Bombay: N. M. Tripathi Pvt. Ltd., under the auspices of The Indian Law Institute; South Hackensack: Fred B. Rothman & Co., 1973. Pp. 203.

Index. Rs 25.00.) The title of this book is a misnomer; at most, the book is an overview of directions and problems in certain areas of the international law of trade transactions. The authors discuss four major topics: international shipping legislation; international sale of goods; international payments; and international commercial arbitration. Under each of these major headings there is a review of the reports of the United Nations Commission on International Trade Law (UNCITRAL) and a summary of the related Indian law. The international portions of this book are principally a rehash of UNCITRAL papers, with a modest amount of extra legal research. Little original thought appears to have been given to the problems mentioned in the UNCITRAL reports which, when coupled with the extremely large number of grammatical and typographical errors appearing throughout the volume, suggests that anyone wishing to get a general background in the area read the UNCITRAL reports themselves, for they are at least good reading.

To the extent the book has value, it is in the various summaries of Indian law on the subjects of sale of goods, negotiable instruments, bankers' commercial credit, guaranties, secured transactions, and enforcement of foreign arbitral awards. The chapters on these subjects appear to be a useful, if summary, introduction to the subjects. Even this portion is flawed by the dearth of recent citations to Indian law, and one gets little feel for the important legal problems which concern Indian commerce today.

STANLEY F. FARRAR

*Business Transactions with the USSR.* Edited by Robert Starr. (Chicago: American Bar Association, 1975. Pp. xvii, 545.) Economic relationships between the Soviet Union and the West have been so tenuous and ephemeral for so long that it comes as somewhat of a surprise to encounter a discussion of possible changes resulting from the maturation of Soviet-Western trade relations. Such an analysis is important now, not primarily because these trade relationships have in fact matured (which is certainly open to debate), but because we finally have enough practical experience and firsthand knowledge of Soviet institutions and practices to risk some judgments as to the results which will proceed from particular proposals on our part.

Robert Starr, who edits this volume, is no stranger to the complexities of East-West Trade. His book *East-West Business Transactions* and an American Bar Association series of seminars in the USSR in 1973 were the generating forces behind this edition. Mr. Starr has integrated articles from a dozen authorities on Soviet business practices to give perspective on topics ranging from technology transfers and licensing and cooperation projects with the USSR to sovereign immunity. There is an excellent updating of a rather widely known earlier article by Professor Berman of Harvard on the legal framework of trade between East and West. This volume illuminates for lawyers and trade representatives the legal context within which they must plan and negotiate. The varying liabilities, contractual restrictions, and taxing prerogatives of Soviet Foreign Trade Organizations and overseas Trade Representatives are in many cases quite different from what one would expect in the West. The fact that all Soviet trade is "conducted by state organizations on the basis of integrated national planning" is a consideration that Starr continually returns to.

Other topics which the book covers are industrial property protection, taxation, establishment of offices in the USSR, and arbitration of US-USSR



trade disputes. In expanding on these themes Mr. Starr and his coauthors have taken care to indicate those areas in which practice has shown that Soviet negotiators have flexibility and those in which no flexibility is likely to be possible. In addition, the extensive appendices to the book are invaluable to the nonspecialist because they include not only the important US-Soviet trade agreements but also texts of significant Soviet statutes and regulations concerning foreign trade.

Despite some years of experience with Soviet-American trade, the complexities of Soviet procedures are such that American enterprise still needs fairly sophisticated guidance to achieve profitable results. *Business Transactions with the USSR* provides this guidance with some facility and is particularly incisive in indicating the relevant idiosyncracies of various Soviet institutions. The book goes beyond being a mere introduction and focuses on the questions that are of most importance to Americans concerned with the area.

JAMES R. SILKENAT

*The International Air Transport Association. A Case Study of a Quasi-Governmental Organization.* By Richard Y. Chuang. (Leiden: A. W. Sijthoff, 1972. Pp. xviii, 185. Dfl. 35.00.) Dr. Chuang has taken on a formidable challenge in presenting this study of the International Air Transport Association (IATA), the body which is the chief spokesman for the world's scheduled airlines. Better known to the public at large than its intergovernmental counterpart, the International Civil Aviation Organization (ICAO), IATA is nevertheless very much of a mystery to the man in the street. It makes the headlines when airline fares go up and the pocketbook of the jet set is affected. Then it is condemned as an international cartel. Yet, as Dr. Chuang points out, IATA is closely linked to governments. Indeed, fare increases adopted by IATA resolutions are not effective unless approved by governments. Moreover, many IATA airlines are wholly owned by governments. ICAO, the main intergovernmental organization in world aviation, escapes similar criticism because it is not in the ratemaking business and its economic activities tend to take second place to technical regulatory activities governing international civil aviation. Unfortunately for IATA's public reputation, it is the substitute forum for ratemaking activities that might otherwise have taken place in ICAO.

After giving the historical context in which IATA was born in the mid-1940's, Dr. Chuang discusses his subject under such headings as the landmark United Kingdom-United States Bermuda Agreement on Air Transport (1946); IATA and rate control; provisions concerning rates and IATA in other bilateral air transport agreements; organization and functions of IATA in general; the traffic conference machinery; outputs of the conferences and government reservations; enforcement of IATA traffic conference resolutions; economic philosophy, economics of air transportation, and government positions on IATA; the legal nature of public corporations and mixed enterprises; and an analysis of the composition of IATA membership.

As to the legal status of IATA, the author points out that "the majority of the active members of the IATA is either public corporations or mixed enterprises; thus from the viewpoint of the nature of membership, IATA is not a purely private international organization" (p. 149). He further points out that to "most governments, an organization like IATA

is not too dissimilar to an intergovernmental organization. It appears that this organization, as viewed by most governments during its formation, had been intended to be the counterpart of ICAO in the economic sphere" (p. 150).

The book contains four useful appendices on the development of world air transport and related topics. It is completed by an excellent bibliography and a good index. Dr. Chuang has made a scholarly contribution to the sparse analytical literature on IATA and has also made a helpful addition to the growing literature on functional international organizations of which IATA is one of the most important.

GERALD F. FITZGERALD

*Die Schiedsgerichtsbarkeit als Mittel internationaler Streitschlichtung.* By Hans von Mangoldt. Vol. 63 of *Beiträge zum ausländischen öffentlichen Recht und Völkerrecht*. (Berlin, Heidelberg, and New York: Springer-Verlag, 1974. Pp. xii, 214. DM 49.50.) The present volume is the enlarged version (by 100 pages and 250 footnotes) of the Preparatory Report on Arbitration and Conciliation submitted by the author to the International Symposium on the Judicial Settlement of International Disputes convened by the Max-Planck-Institute for Comparative Public Law and International Law on July 10 to 12, 1972 in Heidelberg. The shorter English version, *Judicial Settlement of International Disputes*, was published by the Max-Planck-Institut für ausländisches öffentliches Recht und Völkerrecht in 1974.

The author favors a cautious and sober approach to the problem of arbitration. He is very far away from the enthusiasts who early in this century had seen arbitration as a generally workable alternative to war. The author believes that at present states will be ready to arbitrate only technical disputes of relatively small political importance. If arbitration is successful in settling such disputes, states may gradually be willing also to leave more important matters to arbitration. For this reason the author is opposed to any attempts which might further stimulate the sceptical attitude shown by most states towards arbitration. For the same reason, the author rejects all forms of mandatory arbitration by permanent arbitral bodies as well as by ad hoc tribunals. Any award made against a state which had refused to participate in the arbitration procedure will not settle the dispute and hence will be useless. Therefore, the author opposes all attempts to ensure that an arbitration may be begun or continued even if one of the states concerned is unwilling to participate in the proceedings. The author even suggests ingenious methods to interpret away the very clauses devised after World War II, especially in the ILC Model Rules of Arbitral Procedure, to prevent such a sabotage of arbitration proceedings. Here we believe the author concentrates too much on the dispute-settling effect to be obtained by arbitration. Of course, an award rendered by a tribunal composed merely of the arbitrator appointed by the plaintiff state and of a neutral super arbitrator, will settle the dispute only in case the award may be satisfied out of attachable assets of the defaulting state, without the latter's participation. Such cases have not been quite so rare as one would assume. However, even where there is no chance of thus executing such an award, the work of the tribunal will be far from useless. At least it will have established a legal precedent and thus may have helped to dispel the feeling of complete frustration of the injured state. This too, is a not unimportant part of the role which arbitration may play in international relations. The

author supports his views by ample recourse to examples drawn from diplomatic practice concerning arbitration as well as conciliation and by a careful analysis of arbitration treaties, arbitration awards, and the record of compliance with such awards.

IGNAZ SEIDL-HOHENVELDERN

*Le Labrador à l'heure de la contestation.* By Luce Patenaude. (Montréal: Les Presses de l'Université de Montréal, 1972. Pp. 431. \$9.50.) Territorial disputes are, perhaps, the very crux of international law and thus arouse considerable interest and debate. The subject of this book, while international in origin in the sense appropriate to British intra-Commonwealth relations, now rests entirely within the municipal legal and political jurisdiction of Canada.

Labrador is that part of the province of Newfoundland which appears to take a massive physical and psychological bite out of the province of Québec. The known resources of Labrador are vast and may include offshore petroleum. In 1927, while Newfoundland was still a British colony and Canada ostensibly had exercised independence for 60 years, reference was had to the Judicial Committee of the Privy Council for a final delimitation of the boundary between Canada and the Newfoundland colony. Later, when Newfoundland joined the Canadian Confederation in 1949, the Terms of Union specified that the new province included Labrador. For Québec, and especially Québec nationalists, the 1927 assignment of the hinterland of the Labrador coast to Newfoundland has been a constant irritant. Patenaude's volume is unquestionably the most thorough case so far presented on behalf of Québec's claim.

Patenaude explores in great detail every single juridical aspect of this territorial dispute. The role of the Judicial Committee is challenged and it is argued that this body was inappropriate for resolution of disputes between members of the Commonwealth. The basis for the challenge is constitutional because it is argued that the Judicial Committee is simply an advisory body for the exercise of the Crown prerogative and, hence, not appropriate for arbitration actions. Upon this premise Patenaude builds his case for the adjustment of boundaries between Québec and Newfoundland.

The book, of course, is a polemic and ends with the rallying cry, "it is now or never." As a polemic it deserves a modest response. First, there is nothing in international law which constrains parties to a dispute from submitting it to a final jurisdiction of their choice. Second, while Patenaude makes a case for reconsideration of the 1927 decision, there is little in the book which would challenge Newfoundland's historic claim to the territory as presently defined. The volume adds an interesting dimension to the stream of territorial contestations. However the value is very limited as the matter is now entirely within the scope of Canadian municipal law and, much more importantly, domestic politics.

C. LLOYD BROWN-JOHN

*Das Recht auf die Heimat im historisch-politischen Prozess.* By F. du Buy. (Euskirchen: Verlag für zeitgenössische Dokumentation, 1974. Pp. 200. Bibliography. Index. DM 34.) The concept *Recht auf die Heimat* or "right to the homeland" does not frequently appear in Anglo-Saxon legal literature, probably because Anglo-Saxon peoples have never been threat-

ened with forcible removal from their states of residence. As could be expected, the principal advocates of this right have been the Germans, sixteen million of whom lost their homes in Central and Eastern Europe as a result of the Second World War. German literature in this area is quite extensive. Du Buy's book offers a good summary.

As a Dutchman, du Buy writes dispassionately about the problem of involuntary population transfers, in particular about the expulsion of the Germans. He surveys the development of an international human rights law which prohibits mass deportations, cites Articles 9 and 13 of the Universal Declaration of Human Rights, Articles 3 and 4 of the Fourth Protocol to the European Convention on the Protection of Human Rights, the Genocide Convention, and the Nuremberg Principles. A positive "right to the homeland" thus emerges as a consequence of an international prohibition of mass deportations. Moreover, the right to the homeland is seen as prior to and inseparable from the internationally recognized right of self-determination, which some jurists assert has even become *jus cogens*. Indeed, before a people can exercise the right of self-determination in freely choosing a form of government or in seceding from another state, they must first have the right to live on their own soil. Yet, neither the right of self-determination nor the right to the homeland is assured in the present world. There is no effective enforcement machinery, and in a concrete case of conflict between the sovereign rights of a state and the human rights of a group of people, the decision is likely to fall on the side of, and in direct proportion to the might of, the state involved, and the so-called "principle of effectiveness," which is a variant of the more pedestrian "might makes right" axiom, will surely make final, if not necessarily "legal," the claim of the sovereign state.

Du Buy's book was his dissertation at the University of Utrecht. It is however, not only academically but also politically stimulating. An English translation would be welcome.

ALFRED MAURICE DE ZAYAS

*Retirada y 'silla vacía' en la Organización internacional: sus efectos.* By Manuel Pérez González. (Madrid: Consejo Superior de Investigaciones Científicas, Instituto Francisco de Vitoria, 1974. Pp. 368. Ptas. 350.) This scholarly study, the latest in the Current Problems Series of the Francisco de Vitoria Institute, is by a professor of international law in the Faculty of Law at the University of Complutense. The author is concerned with one aspect of the well-known problem, as quoted from Kant, "of the 'reversibility of state will' after the conclusion of the 'social international pact.'" His focus is upon the right of withdrawal of states from international organizations, and its consequences in terms of international law. This right is viewed as the "culminating manifestation of state volition" as well as constituting a "species of sovereign blackmail."

The work is divided into four parts: 1. "The Effects of Withdrawal Upon the Rules Contracted by Members During Participation"; 2. "Financial Obligations and Withdrawal"; 3. "The Position of the State Concerning the International Institutions Connected with the Institution That is Abandoned"; and 4. "The Suspension of Participation." Each part is preceded by a cogent presentation of the major positions and issues to be discussed. The issues are then examined in terms of both theory and practice, from the "Geneva System" to date, in a realistic way and indicating what is *lex lata* as well as *lex ferenda*. (The role of politics is analyzed in chapter 5.)

Professor Pérez supports his analysis in a well-documented review of the scholarly literature published in English, French, and Italian as well as in Spanish. Another asset is the reproduction in the appendices of all the decisions and pronouncements of international organizations and governments on state withdrawal and suspension. The author concludes his first-rate study by pointing out the need for a set of more specific and realistic criteria governing state withdrawal, which will depend upon "the degree of *material* solidarity of the states and their willingness to cooperate in terms of it."

LARMAN C. WILSON

*La Teoría y la Práctica del Reconocimiento de Gobiernos.* By César Sepúlveda. (Mexico, D. F.: Universidad Nacional Autónoma de México, 1974. Pp. 142.) The author, of the Faculty of Law of the Free National University of Mexico, directs his attention primarily to recognition of governments by and among the states of the Americas, emphasizing trends since the publication in 1954 of the first edition of this monograph. Sepúlveda presents in logical order the concepts and aspects of recognition; *de facto* and *de jure* recognition; the effects of recognition; the doctrines of Jefferson, Tobar, Wilson, and Estrada; collective action in recognition; and recognition during the regime of the Organization of American States. The particular contributions of this brief monograph are twofold: (1) its examination of collective action in recognition and of recognition in the context of the Organization of American States; and (2) its lucid, concise and comprehensive review of the theories of recognition and the problems associated with their application.

While the author clearly prefers the Jeffersonian doctrine of *de facto* recognition—he terms the distinction between *de facto* and *de jure* as "absurd"—and calls for "automatic" recognition, with a renunciation of intervention, his handling of the subject is scholarly and evenhanded. The breadth of his treatment is evidenced by the sources cited in his footnotes which frequently contain not only citations but also substantive elaborations of allusions in the text. There is an appendix that contains relevant portions from twelve documents and excerpts from numerous adjudicated cases. Other assets are a table of cases and a four-page bibliography that is both comprehensive and cosmopolitan. For one who is at home in Spanish, this essay provides an informative exposition of recognition of governments and a delightful experience in smooth reading.

WILLIAM G. CORNELIUS

*La Représentation du Personnel à l'Organisation Mondiale de la Santé et dans les Principales Institutions Spécialisées des Nations Unies ayant leur Siège en Europe.* By Yves Beigbeder. (Paris: Librairie Générale de Droit et de Jurisprudence, 1975. Pp. iii, 289. Annexes. Index. F. 97.) A little known body of international organization law and practice has been developed, especially since World War II, by the staff associations of intergovernmental organizations. Mr. Beigbeder's monograph contains a comprehensive analysis of the status, organization, function, and operations of the staff associations of WHO and other UN specialized agencies situated in Europe. Lawyers will find particularly useful the author's analysis of the right to organize, the legal nature of staff associations, their internal structures, procedures, and financing, and the vehicles by which

relations are maintained between associations and administrations. As a staff member of WHO, the author writes with special authority on that organization, and the comparative approach of his work illuminates the different choices which have been made in a number of organizations.

The efforts of organizations to unify the international civil service by means of coordination machinery did not, as the author shows, go unnoticed by the staff associations. Their response was to organize themselves upon a multilateral basis in order to have their influence felt in the coordination bodies and eventually in the UN General Assembly, where effective decisionmaking power on staff questions is lodged. Those movements toward coordination of organizations and the corresponding grouping of staff associations have contributed, each in its own way, to the integration of the international secretariats, and that important chapter in the history of organizations is particularly well described and analyzed in this work. Although the author limited his investigations to UN institutions in Europe, he has succeeded in gathering the key elements of his elusive subject from many disparate sources. He writes with scholarly competence and presents this material judiciously in readable and manageable form.

RICHARD F. SCOTT

*The Paul Felix Warburg Union Catalog of Arbitration. A Selective Bibliography and Subject Index of Peaceful Dispute Settlement Procedures.* Compiled and edited by Katharine Seidel. (Totowa, N.J.: Rowman and Littlefield, 1974. Pp.: vol. 1, 444; vol. 2, 462; vol. 3, 334. \$85 for the three volumes.) This first effort to make available the vast arbitration material stored in nineteen libraries of universities and bar associations in the United States has been most successful. Publications in this country and abroad, covering books, articles in periodicals, statutes, treaties, and documentation by governments and international organizations, are computer-based indexed. In volume 1 all entries are arranged in alphabetical order; volume 3 covers labor arbitration in both the private and public sector. The second volume is of special interest. It deals with commercial arbitrations in various countries and has a part on international public arbitration (pp. 231-462). The subject headings cover agreements, arbitrators, procedures and applicable law, commentaries on arbitration cases of various international tribunals, among them the Mixed Arbitral Tribunals and the various U.S. Special Claims Commissions, dissertations from many countries, bilateral and multilateral arbitration treaties, World War I and II reparation claims, concession contracts, investment arrangements, government arbitrations with private foreign parties, and the activities of the League of Nations and the United Nations in the field of public international arbitration. Such bibliographical service on a broad scale is a valuable contribution not only to the scholarly treatment of arbitral issues, but also to the practical use in a field of increasing importance: the settlement of controversies in an organized manner acceptable to the modern development of international law.

MARTIN DOMKE

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[The following abbreviations refer to sections of the *Journal*: *BN*, Book Note; *BR*, Book Review; *CP*, Contemporary Practice of the US Relating to International Law; *Ed.*, Editorial Comment; *JD*, Judicial Decisions; *LA*, Leading Article; *NC*, Notes and Comments; *OD*, Official Documents. Other abbreviations include: GA res., United Nations General Assembly resolution; GATT, General Agreement on Tariffs and Trade; ICJ, International Court of Justice; ICRC, International Committee of the Red Cross; ILC, International Law Commission; LOS, Law of the Sea; OAS, Organization of American States; OPEC, Organization of Petroleum Exporting Countries; OPIC, US Overseas Private Investment Corporation]

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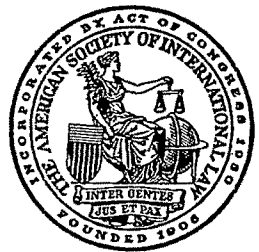
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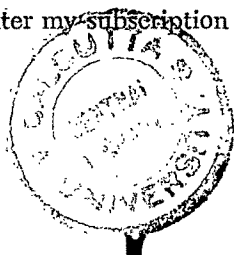
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